Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1996

WJM REALTY, INC.,

Petitioner,

v.

STATE ROADS COMMISSION OF THE STATE HIGHWAY ADMINISTRATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED FOR REVIEW

What should be the test for whether a taking is beyond the scope of the project under United States v. Miller, 317 U.S. 369 (1943), thereby entitling Petitioner to enhanced compensation under the Takings Clause of the Fifth Amendment or actual damages for violation of the Due Process Clause of the Fourteenth Amendment.

Whether, in this case, as a matter of law, the taking exceeds the scope of the project under United States v. Miller because the State Roads Commission did not have the requisite statutory authority to condemn Petitioner's land for an enormous storm water drainage facility unrelated to a highway project and principally benefiting another private landowner.

PARTIES TO PROCEEDINGS BELOW

The parties to this action in the Maryland Court of Special Appeals and the Maryland Court of Appeals were WJM Realty, Inc. and the State Roads Commission of the State Highway Administration. Additional parties before the Circuit Court of Montgomery County were Grant S. Heston and Jean Dulin Heston, Trustees, Lawrence A. Shulman and David A. Pordy, Trustees, the Washington Suburban Sanitary Commission, and Montgomery County, Maryland.

Pursuant to Supreme Court Rule 29.6, Petitioner discloses that WJM Realty, Inc. is a wholly-owned subsidiary of William J. Miller Realty, Inc. which is owned entirely by William J. Miller.

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No.

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SUPREME COURT OF THE UNITED STATES
October Term, 1996

WJM REALTY, INC.,

Petitioner,

v.

STATE ROADS COMMISSION OF THE
STATE HIGHWAY ADMINISTRATION,

Respondent.

On Petition For Writ of Certiorari
To The Court of Special Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

WJM Realty, Inc. ("Petitioner") respectfully petitions for a writ of certiorari.

OPINIONS BELOW

The judgment of the Honorable James S. McAuliffe, Jr., Specially Assigned Judge of the Circuit Court for

Montgomery County, Maryland dated August 29, 1995 in State Roads Commission of the State Highway Administration v. WJM Realty, Inc., et al., Civil No. 93,313 ("Memorandum Opinion and Order") and relevant portions of the transcript of the hearings referenced in the judgment (Appendix C) appear at App.84. [1]

The opinion of the Maryland Court of Special Appeals in State Roads Commission of the State Highway Administration v. W.J.M. Realty, Inc., et al., No. 1620, September Term, 1995, August 9, 1996 (unreported) ("Per Curiam Opinion") (Appendix B) reversing and remanding Judge McAuliffe's judgment appears at App.2.

The order of the Maryland Court of Appeals in WJM Realty, Inc. et al. v. State Roads Commission of the State Highway Administration, No. 444, September Term, 1996, December 11, 1996 ("Order") (Appendix A) denying certiorari appears at App.1 and is reported at 344 Md. 119, 685 A.2d 453 (1996).

JURISDICTION

The order of the Maryland Court of Appeals was entered on December 11, 1996 (App.1). The jurisdiction of

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[1] Page numbers refer to pages in the Appendix.

this Court is founded upon 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments of the United States Constitution including due process, taking, and just compensation. This case also involves the Quick Take provision under Maryland Constitution Article III, § 40B, and the general power to acquire private property under Maryland Code Annotated, Transportation Article, §§ 8-101, et seq. Relevant constitutional and statutory provisions appear as Appendix D (App.114).

STATEMENT OF THE CASE

Montgomery County (the "County") obtained the assistance of the State Roads Commission of the State Highway Administration to improve Maryland Route 108, the intersection of Maryland Routes 108 and 124, and a stub extension of Route 124, adjacent to Petitioner's property in Damascus, Maryland.

The highway project dates back to May 1971, when the County amended its Master Plan to show the proposed highways in Damascus. Land records and other documents

from the 1960's also reference the proposed highways. When Petitioner acquired its parcel in 1978, it obtained a perpetual right of way and easement for unlimited access for vehicular and pedestrian traffic from its land to the new highway. In 1987, funds were allocated for the project through an amendment to a memorandum of understanding with the County. In 1988, during a public hearing, the State presented its preliminary plans and drawings to extend Route 124 some 500 feet. In 1990, the State presented its final plans for the Route 124 extension.

The State Roads Commission acquired rights to both the first 600 feet and the second 500 feet sections from an adjoining land owner (the Shoeb family) in return for access to the highway, pursuant to a right of entry agreement between the land owners and the County dated February 15, 1991. Although Petitioner has an easement over the land acquired for this purpose, the State Roads Commission ignored the easement.

Meanwhile, property owners in Damascus had a problem with drainage control (App.93). By far the largest property owner affected was Cynwyd, which owned a shopping center located across the proposed highway from Petitioner's property. The Master Plan in which the highways were referenced did not provide for regional storm water

management. The storm water facility originally to be constructed for highway storm water management was significantly smaller than the facility that was ultimately built. The original facility was to be constructed on Cynwyd property, and replace an existing sediment pond.

Later, in 1987, Cynwyd prepared plans for an off-site storm water facility on Petitioner's property. Robert C. Merryman, Chief of Transportation Engineering for the County, called it a regional facility (App.95). The County was interested in participating in the facility to provide retention serving a larger area. After considering the County's proposal, Petitioner refused to allow its site to be used (App.104).

In 1989, the County proposed to the State Roads Commission that Cynwyd's land not be taken, but that Petitioner's site be acquired over Petitioner's objection "to provide retention serving a larger area" including Cynwyd's shopping center. (Memorandum Opinion and Order, App.85.)

On July 16, 1992, the State Roads Commission commenced an action in the Circuit Court of Montgomery County to condemn 1.074 acres of Petitioner's land in fee simple and another 0.036 acre of Petitioner's land for revertible easements for supporting slopes. The land is part of a larger parcel of land that Petitioner owns in Damascus.

Although the stated purpose for the condemnation was for the construction of Maryland Routes 108 and 124, the State Roads Commission took Petitioner's land for a storm water facility. Prior to commencing the action, the State Roads Commission deposited a check with the Clerk of the Circuit Court in the amount of $8,950 (later reduced to $8,650) under the Quick Take provisions of the Maryland Code as the alleged fair market value of the land and improvements taken and for damages, if any, done to the property. Construction began around 1992.

In a bench ruling on March 14, 1995, the Circuit Court held that the storm water facility was not for the purpose of the State Roads Commission's highway construction project, which, as stated in the Condemnation Petition, was the widening of a segment of Route 108. The Circuit Court ruled:

> The so-called storm water drainage project is at the very least a separate project totally and completely from the state project. The **overwhelming evidence** is that whatever interest it served for the state were incidental to the greater interest being served ...

(App.99.) (Emphasis added.)

The Circuit Court then opined that the State Roads Commission's Quick Take powers were being illegally used

to acquire Petitioner's land for the County to benefit the County and the private owner of the shopping center, because neither the shopping center owner nor the County was able to acquire Petitioner's land contractually to solve the shopping center's storm water problem. Addressing the State Roads Commission, Judge McAuliffe said: "If there is a right of condemnation for a storm water facility to serve a regional need, that power does not lie with you [the State Roads Commission]."

On August 29, 1995, prior to trial, Judge McAuliffe dismissed the condemnation proceeding based on Petitioner's motion dated November 16, 1994. The Circuit Court found that the State Roads Commission sought to condemn Petitioner's land to serve the developmental purposes of another private owner (i.e. Cynwyd), and held that this action was an impermissible use of the public power of eminent domain. The Circuit Court found that the taking for regional storm drainage was beyond the State Roads Commission's authority. (Memorandum Opinion and Order, App.84.)

The Circuit Court ruled on the State Road Commission's motion in limine, finding that the storm water facility was outside the scope of the public highway project, and allowing the Petitioner to present evidence that the value of the property should be enhanced by the anticipated effect

of the highway project (App.101). Maryland Code Annotated, Real Property Article § 12-105. [2] [3]

The Circuit Court held that the condemnation was not constitutionally or statutorily authorized and that the State Road Commission was without authority to condemn the property. The Judge found that the land taking (Quick Take) for a regional storm drainage was beyond State Road Commission's authority because the State Roads Commission "seeks to condemn land of one private owner to serve developmental purposes of another private owner." (Memorandum Opinion and Order, App.84.)

The State Roads Commission appealed the judgment dismissing its condemnation complaint to the Maryland Court of Special Appeals. On August 9, 1996 the Court of Special Appeals reversed and remanded the case to the Circuit Court

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[2] The Circuit Court also dismissed Petitioner's third party complaint against Montgomery County for inverse condemnation, conspiracy and violation of civil rights under 42 U.S.C. § 1983, ruling as a procedural matter that the third party claim was not appropriate in a condemnation case (App.92-93).

[3] The Circuit Court also ordered the State Roads Commission to amend its condemnation petition to address Petitioner's easement that was taken by the highway. "[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation." Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (cited in Preseault v. ICC, 494 U.S. 1, 24 (1990) (concurring opinion)).

for further proceedings. The Appeals Court concluded that the State Roads Commission legally used its Quick Take powers to condemn Petitioner's property as related to "any highway purpose" under Article III, § 40B of the Maryland Constitution and Title 8 of the Transportation Article. (Per Curiam Opinion, App.4,53.) The Appeals Court found that State Roads Commission was acting in accordance with the requirements of the U.S. Constitution because the Quick Take of land for the storm water facility was for a "public use." (Per Curiam Opinion, App.53.) The Appeals Court declined to find that the primary purpose of the storm water facility was to benefit Cynwyd or other private landowners. (Per Curiam Opinion, App.63.)

Further, the Appeals Court found that the Circuit Court's factual findings were clearly erroneous with respect to whether the storm water facility was within the scope of the highway project for purposes of valuation. (Per Curiam Opinion, App.3,79-83.)

The Appeals Court ordered the Circuit Court on remand to determine, based on Baylin v. State Roads Commission, 300 Md. 1, 475 A.2d 1155 (1984), the date upon which "landowners and prospective purchasers no longer could reasonably anticipate being able to devote [their] properties to their highest and best use in the context of the

surrounding governmental project." (Per Curiam Opinion, App.3,79-83). The Appeals Court opined that the commitment date may have been in 1987, when the funds were allocated for the project through amendment to the memorandum of understanding, or in 1988, when the State presented its preliminary plans and drawings to extend Route 124 some 500 feet during the public hearing, or in 1990, when the State presented its final plans of the Route 124 extension. Id. It found that the Circuit Court erred in holding that the date of commitment was in May 1971, when the County amended its Master Plan, which, it said, was advisory in nature. (Per Curiam Opinion, App.79-80.)

Petitioner sought a writ of certiorari from the Maryland Court of Appeals. On December 11, 1996 that Court denied Petitioner's petition finding that "there has been no showing that review by certiorari is desirable and in the public interest." (Order, App.1.)

REASONS FOR GRANTING THE PETITION

I.

THE TEST FOR WHETHER A TAKING IS BEYOND THE SCOPE OF THE PROJECT UNDER UNITED STATES V. MILLER THEREBY ENTITLING

PETITIONER TO ENHANCED COMPENSATION UNDER THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT OR ACTUAL DAMAGES FOR VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT MUST BE REVISITED

Under very similar facts, including the facts of this case, different courts have reached different conclusions as to whether condemned property was beyond the scope of the government project. Courts have acted in this area not as triers of fact, but ruling on the law, subject to de novo review on appeal. More exact guidance in this area is critical.

The scope of the project rule, formulated by the Court in United States v. Miller, is easy to state: If the property being condemned was "probably within the scope of the governmental project from the time the government was committed to it," the landowner is not entitled to compensation for any increase in value caused by the project. United States v. Miller, 317 U.S. 369, 376-77 (1943). The rule, however, is not easy to apply. United States v. 320.0 Acres of Land, 605 F.2d 762, 782 (5th Cir. 1979). Consequently, the Court clarified the scope of the project rule in United States v. Reynolds, 397 U.S. 14 (1970). Although dicta, the Court restated the Miller rule and noted the

following:

> As with any test that deals in probabilities, its application to any particular set of facts requires discriminating judgment. The rule does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the course of the planning or original construction it became evident that land so situated would probably be needed for the public use.

Reynolds, 397 U.S. at 21 (footnote omitted.) The question of whether the taking of land in issue was within the scope of the original project is a legal question to be decided by the trial court. Reynolds, at 20 n. 14.

Other courts have refined the scope of the project rule to reflect the reasonable expectations of landowners and prospective purchasers as to whether a piece of property will be taken. See e.g., United States v. 320.0 Acres of Land, 605 F.2d 762, 793 (5th Cir. 1979) (noting that the "crucial inquiry" is whether a landowner or a private purchaser could reasonably anticipate that he could devote the property to its highest and best economic use without serious fear that the government would soon condemn the land); United States v. 31.43 Acres of Land, 547 F.2d 479, 481-82 (9th Cir. 1976) (affirming the trial court's finding that property was within the

scope of the project where no public information existed that might have led a property owner to believe that his land would not be a probable object of condemnation); United States v. 172.80 Acres of Land, 350 F.2d 957, 959 (3rd Cir. 1965) [Mercer County] (holding that a landowner was entitled to the enhanced value of his property because a purchaser contemplating acquisition and development of the property could reasonably have anticipated that, at the time the government committed to the project, he would be able to devote that land to its highest economic use without serious apprehension of condemnation); United States v. 49.01 Acres of Land, 669 F.2d 1364, 1367 (10th Cir. 1982) (holding that the scope of the project rule, as enunciated by Miller and Reynolds, requires the government to pay the enhanced value of the land if "the landowner reasonably believed that subsequent government action removed the property from the project's scope"); United States v. Eastman, 528 F.Supp. 1177, 1182 (D.Or. 1981) (holding that the Fifth Circuit's reasonable-expectations test requires that the enhanced value be an element of a landowner's condemnation award).

The Maryland Court of Appeals adopted Miller in Baylin v. State Roads Commission, 475 A.2d at 1161. The Maryland Court went on consider the following three factors to determine if a taking was reasonably foreseeable: (a) The

foreseeability that the original proposed dimensions of the project might have to be changed to include the condemned property, (b) the length of time between commencement of the project and condemnation of the property, and (c) government representations concerning the finality of the project as originally announced. Baylin, 475 A.2d at 1162-63.

Even as refined to reflect the reasonable expectations of the landowners, however, the application of the scope of the project rule leads to different results on similar facts. The following decisions, including the instant case provide examples of such inconsistency:

In United States v. 62.17 Acres of Land, 538 F.2d 670 [Jasper County] the government did not specify the landowner's property in the original plans. Nevertheless, the government's representations that it would take all of the property within the five year flood line and the probability of mistakes in surveying made it reasonably foreseeable that the government would take the landowner's property. Jasper County, 538 F.2d at 681. In United States v. Crance, 341 F.2d 161 (8th Cir. 1965) the district court held that the property was not within the scope of the project, finding that the government decided to take the remaining 35 acres of the landowner's tract to create public recreation facilities after it

purchased five acres from the same landowner for a dam and reservoir project. Crance, 341 F.2d at 162-63. Although from its inception, the project called for recreational facilities around the reservoir, neither a preliminary design memorandum nor a public proposal of sites approved the Chief of Engineers included taking any of the remainder of the landowner's tract. Thus, the district court allowed evidence concerning the enhanced value of the property. Crance, 341 F.2d at 162. On appeal, the Eighth Circuit reversed, noting that none of the plans that excluded the landowner's additional property was a final plan and finding significant that "the project contemplated recreational areas from its very inception." Crance, 341 F.2d at 165.

In Mercer County, the government purchased 20 acres of a landowner's 100 acre tract for a dam and reservoir project. During negotiations, the government representative assured the landowner that the government would not need other parts of his land for the project. Although the original project did not call for the creation of recreational areas, a change in the government's policy concerning public developments and the use of reservoir areas prompted a decision to acquire the remainder of the landowner's property for recreational use. The Third Circuit affirmed the holding of the district court that the enhanced value of the property

should be included in the condemnation award. Mercer County, 350 F.2d at 959. The Third Circuit distinguished Mercer County from Crance based on the differences between the government's representations and the original plans of the projects.

In Baylin, the Maryland trial court excluded any evidence of enhancement for a mass transit facility that was constructed after an expressway, finding that they were part of the same project. The Maryland Court of Appeals, on the other hand, found that the construction of the two projects was in fact two separate projects for the purpose of determining just compensation. Baylin, 475 A. 2d at 1158.

In the instant case, the highway project dates back to May 1971, when the County amended its Master Plan to show the proposed highway. Land records and other documents from the 1960's also reference the proposed highways. When Petitioner acquired his parcel in 1978, he obtained a perpetual right of way and easement for unlimited access for vehicular and pedestrian traffic from his land to the new highway. In 1987, funds were allocated for the project through amendment to a memorandum of understanding with the County. In 1988, during a public hearing, the State presented its preliminary plans and drawings to extend Route 124 some 500 feet. In 1990, the State presented its final

plans for the Route 124 extension. The State Roads Commission acquired rights to land for the highway from an adjoining land owner (the Shoeb family) in return for access to the highway in February 1991.

At some point, the County decided to construct a storm water facility and persuaded the State Roads Commission to use its Quick Take condemnation powers to acquire the land. The storm water facility originally to be constructed for highway storm water management was significantly smaller than the facility that was ultimately built, and it was to be constructed on Cynwyd property. Later, in 1987, Cynwyd prepared plans for an off-site storm water facility on Petitioner's parcel. Robert C. Merryman, Chief of Transportation Engineering for the County, called it a regional facility (App.95). The County was interested in participating in the facility to provide retention serving a larger area. However, after considering the County's proposal, Petitioner refused to allow its site to be used (App.104). In 1989, the County proposed to the State Roads Commission that Cynwyd's land not be taken, but that Petitioner's site be acquired over Petitioner's objection "to provide retention serving a larger area" including Cynwyd's shopping center. Memorandum Opinion and Order, 8/29/95, p. 2.

Judge McAuliffe ruled, as a matter of law, that the highway project and the storm water facility were two separate projects. He found that the storm water facility was not mentioned in the earlier plans for the highway or in the land records of the landowners adjoining the highway. Moreover, he found that the storm water facility actually built was more excessive than originally planned and was unneeded for the highway. He concluded that it was built as a regional facility unrelated to the highway and for the benefit of another private landowner.

The Maryland Court of Special Appeals ruled that the scope of the project could only have been determined not earlier than 1987 when the funds were allocated for the project, and not in May 1971 when the County amended its Master Plan. (Per Curiam Opinion, App.82.) Master plans, it held, are advisory in nature, "[a]bstract, long range planning of the sort done in the master plan cannot qualify as the practical, detailed design necessary to constitute a commitment to a project under the scope of the project rule" (App.80). The highway project had been programmed for twenty years (App.101) and was reflected in the Master Plan, land records and other documents. Landowners and purchasers had been relying on the highway project well before there was any discussion of a regional storm water

facility. Yet, the Court of Appeals, when reviewing exactly the same evidence as the Circuit Court, reached a different result.

Consequently, as shown above, under very similar facts, including the facts of this case, different courts have reached different results, not as triers of fact, but as rulings on the law, subject to de novo review on appeal. Guidance in this area is critical.

II.

IN THIS CASE, THE TAKING OF PETITIONER'S PROPERTY BY THE STATE ROADS COMMISSION EXCEEDS, AS A MATTER OF LAW, THE SCOPE OF THE PROJECT UNDER UNITED STATES V. MILLER BECAUSE THE STATE ROADS COMMISSION DID NOT HAVE THE REQUISITE STATUTORY AUTHORITY TO CONDEMN PETITIONER'S LAND FOR AN ENORMOUS STORM WATER DRAINAGE FACILITY UNRELATED TO A HIGHWAY PROJECT AND PRINCIPALLY BENEFITING ANOTHER PRIVATE LANDOWNER

There is a two-step process for determining whether a taking is constitutionally permissible: (1) Whether it is for a public purpose, and (2) whether the taking is authorized by

statute.

In Cincinnati v. Vester, 281 U.S. 439 (1930) owners of land in the City of Cincinnati sought to restrain the appropriation of excess property by the City on the grounds that the taking was not in accordance with the applicable provisions of the constitution and statutes of Ohio and would constitute a deprivation of property without due process of law in violation of the Fourteenth Amendment. The Court considered whether the taking was for a public use and concluded that the municipality had failed to define the purpose of the appropriation as required by Ohio law. Although the question of what is a public use is a judicial one, the Court refrained from deciding that question in the absence of a municipal determination. The Court examined whether the municipality had complied with the Ohio statutes and ruled that it had not. "We understand it to be the rule in Ohio, as elsewhere that the power conferred upon a municipal corporation to take private property for public use must be strictly followed."

In the instant case, the scope of the project under United States v. Miller was exceeded as a matter of law because the taking was for a private purpose and because it was beyond the statutory authority of the State Roads Commission.

A. THE TAKING WAS FOR A PRIVATE PURPOSE

"Private property cannot be taken by the government, national or state, except for purposes which are of a public character ... any state enactment in violation of these principles is inconsistent with the due process law prescribed by the Fourteenth Amendment." Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239 (1905); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). It is only necessary to show that the primary purpose was to benefit the private owners to find that the taking was impermissible. See Mayor & City Council of Baltimore v. Chertkoe, 293 Md. 32, 441 A.2d 1044, 1055 (1982).

In the instant case, Judge McAuliffe found that the taking of Petitioner's property for a storm water facility was for a private purpose and was impermissible under the public power of eminent domain. He stated:

> Plaintiff State Roads Commission of the State Highway Administration seeks to condemn land of one private owner to serve developmental purposes of another private owner. This is an impermissible use of the public power of eminent domain.

Memorandum Opinion, p.1 (App.84). In the hearing on this matter, Judge McAuliffe put it another way, stating:

> We aren't talking condemnation now, we are talking Constitutional right and damages for invading basic Constitutional protections and corrupting the process to use the power of imminent [sic] domain for a private purpose wholly wrong when that private entity could not get what they were seeking at the bargaining table. It was done. They got it.

(App.108-109.)

The Circuit Court relied on overwhelming evidence in support of its ruling (App.99). Nonetheless, the Appeals Court found, as a matter of law, that the storm water facility was for a public use and declined to find that the primary purpose of the storm water facility was to benefit Cynwyd or other private landowners. (Per Curiam Opinion, App.63.) In arriving at its conclusion, the Appeals Court reached well beyond the record to find a public purpose for the taking. The finding is not based upon any statements by State (or even County) officials prior to the taking as to the public necessity, but rather upon an arbitrary and expansive view by the Appeals Court of the need for an enormous regional storm water facility. The opinion ignores the stated purpose of the taking as recited in the Condemnation Petition, which was "the widening of a segment of Route 108." The Appeals Court's determination in the face of overwhelming evidence

cannot stand.

B. THE TAKING WAS BEYOND THE COMMISSION'S AUTHORITY

This case involves the use of Quick Take condemnation proceedings. In conventional condemnation cases, no right to possession of private property is obtained by the condemning authority until it pays the full amount of the condemnation judgment plus costs. King v. State Roads Commission, 298 Md. 80, 467 A.2d 1032 (1983). In Quick Take proceedings, property is taken immediately upon payment into Court of an estimate of the price with any further amounts to be paid to the landowner after judgment. In the present case, over four years have passed since the filing of the condemnation petition in July 1992, and Petitioner has neither received the return of its land nor the compensation to which it is entitled. Nor is Petitioner able in the presence of this facility, what Judge McAuliffe called "a major eyesore from a development standpoint," "a monstrosity as to size," to use the remainder of its property to its highest and best use (App.100).

The State is entitled to use Quick Take proceedings for only very limited purposes. Statutes and constitutional provisions conferring the power of eminent domain must be

strictly construed. Davis v. Board of Education of Anne Arundel Co., 166 Md. 118, 120, 170 A. 590 (1933). Here, the Circuit Court found that the "land taking (Quick Take) for regional storm drainage is beyond commission authority." (Memorandum Opinion, App.84.) The Appeals Court concluded that the taking was within the Commission's authority because it was related to "any highway purpose." (Per Curiam Opinion, App.3,52.) Based upon a statutory analysis, the Appeals Court reasoning must fail.

Quick Take powers of the State Roads Commission are set forth in Maryland Constitution Article III, §40B. They are limited to highway purposes. Section 40B states:

> The General Assembly shall enact no law authorizing private property to be taken for public use without just compensation, to be agreed upon between the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation, except that where such property in the judgment of the State Roads Commission is needed by the State **for highway purposes**, the General Assembly may provide that such property may be taken immediately upon payment therefor to the owner or owners thereof by said State Roads Commission, or into Court, such amount as said State Roads Commission shall

> estimate to be of fair value of said property, provided such legislation also requires the payment of any further sum that may subsequently be awarded by a jury.

(App.115-116.) (Emphasis added.)

The Maryland Constitution does not authorize the taking of private property by the State Roads Commission for a purpose not related to highways. [4]

Relevant provisions of the Maryland statutes reinforce the constitutional limitation of the State Road Commission's exercise of its Quick Take powers to highway purposes only. Although Maryland Transportation Article § 8-302 allows condemnation by the State Roads Commission under the Quick Take provisions to acquire "any private property for any highway purpose" (App.118), the definitions in Maryland Transportation Article § 8-101 define "related storm water management facilities and structures" narrowly as "structures

---

[4] Although the County may also be authorized to Quick Take land for a right of way for County roads or streets, this power, too, is strictly limited to condemnations for roads and streets, not storm water management facilities. Maryland Constitution, Article III, § 40A (App.114-115). Moreover, there must be a finding by the County Council that there is an immediate need for the right of way for County roads or streets. Id. In this case, there has been no showing that the County has complied with its statutory responsibilities. See, Cincinnati v. Vester, 281 U.S. 439 (1930). In fact, Judge McAuliffe concluded the opposite.

forming an integral part of a street, road, or highway" and "property acquired for the construction, operation, or use of the highway." (App.116-117.)

Judge McAuliffe found that the storm water facility was too enormous to be incident to a highway purpose. Indeed, the testimony was that the facility was constructed as a regional facility principally to benefit the private neighboring land owner. Consequently, the Quick Take condemnation of Petitioner's land for the purpose of an unrelated storm water facility was beyond the limited constitutional and statutory authority of the State Roads Commission.

The State Roads Commission may not use its Quick Take authority for a regional storm water facility benefiting principally another private landowner simply because the County requested that the Commission exercise its power. Moreover, the power of one municipal authority to condemn property cannot be lent to another. As Judge McAuliffe stated:

> I remain of the view, based upon the evidence that we heard, that this project undertaken by the State so exceeded the State's authority to condemn for drainage required by its road project, and only that required by its road project, that the power was exceeded to such

> an extent that it cannot be said that it was appropriately used or legally used, and I conclude that the motion to dismiss on the grounds that it was not used for a purpose of public necessity within the purview of the State Highway Administration's authority to condemn -- it may have been -- within the authority of others, but the Highway Administration may not lend out its eminent domain powers to be exercised by others who have eminent domain powers -- This is not a power to be kicked around or to be traded back and forth. If you have the power, you exercise it. The State has the power in connection with roads, the State Highway Administration; this storm water drainage facility was a facility to serve much, much more than the roads themselves and was ultimately built, I am convinced, exactly as it was suggested in the footnote to the memorandum which appeared in the original record as defendant's number 5.

(App.112-113.)

Consequently, the taking of Petitioner's property by the State Roads Commission exceeded, as a matter of law, the scope of the project under United States v. Miller. The State Roads Commission did not have the requisite statutory

authority to condemn Petitioner's property for a storm water facility which was unrelated to a highway project.

III.

BECAUSE THE TAKING IS BEYOND THE SCOPE OF THE PROJECT UNDER UNITED STATES V. MILLER, PETITIONER IS ENTITLED TO ENHANCED COMPENSATION UNDER THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT OR ACTUAL DAMAGES FOR VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Under United States v. Miller Petitioner should be entitled to the benefit of the highway in calculating the value of the property taken for the storm water facility. Petitioner should also be entitled to actual damages for violation of the Due Process Clause of the Fourteenth Amendment.

Chief Justice Rehnquist stated in Dolan v. City of Tigard, 512 U.S. - , 129 L.Ed.2d 304, 323 (1994):

> Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization particularly in metropolitan areas ... The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be

> done. "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal [Co. v. Mahon], 260 U.S. [393,] at 416 [(1922)].

In condemning land in this case by using Quick Take powers, the County used the State Roads Commission to take a short-cut. The State Roads Commission had no authority to take land for a regional storm water facility. Petitioner should be entitled to the benefit of the highway in calculating the value of the property taken for the storm water facility. Petitioner should also be entitled to actual damages for violation of due process under the Fourteenth Amendment.

The remedy for a regulation that goes too far, under the due process theory is not just compensation, but invalidation of the regulation, and if authorized and appropriate, actual damages. Williamson Planning Commission v. Hamilton Bank, 473 U.S. 172, 197 (1985).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: March 11, 1997.

Respectfully submitted,

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No. _____

FILED

961460 MAR 11 1997

OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1996

WJM REALTY, INC.,

Petitioner,

v.

STATE ROADS COMMISSION OF THE STATE HIGHWAY ADMINISTRATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

WJM REALTY, INC.	*	
ET AL.	*	In the
	*	Court of Appeals
v.	*	of Maryland
	*	Petition Docket No. 444
STATE ROADS	*	
COMMISSION OF THE	*	
STATE HIGHWAY	*	September Term, 1996
ADMINISTRATION	*	(No. 1620,
		September Term, 1995,
		Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell

Chief Judge

Date: Dec 11, 1996

APPENDIX B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1620

SEPTEMBER TERM, 1995

STATE ROADS COMMISSION OF THE
STATE HIGHWAY ADMINISTRATION

v.

WJM REALTY, INC., ET AL.

Moylan,

Hollander,

Eyler,

JJ.

PER CURIAM

Filed: August 9, 1996

#93313

This appeal concerns the condemnation of a portion of a 32.5 acre parcel of land owned by WJM Realty, Inc., appellee, by the State Roads Commission (the "SRC") of the Maryland State Highway Administration ("MSHA"), appellant. On July 16, 1992, the SRC filed a condemnation petition in the Circuit Court for Montgomery County to quick-take 1.074 acres of appellee's land, in fee simple, and to obtain another .036 acres for a revertible easement, in order to construct a stormwater management pond ("SMP") in connection with a joint State and Montgomery County highway project in Damascus.

In a memorandum opinion and order dated August 29, 1995, the court granted appellee's motion to dismiss. On appeal, the SRC presented the following questions for our review:

> 1. Did the circuit court err in holding that the condemnation of appellee's property for an SMP was not for a highway purpose under [Tr.] S 8-313, when the SMP was construction to replace an existing SMP destroyed by the highway project and to manage additional runoff generated by the project?
>
> 2. Did the circuit court err in holding that the construction of the SMP was outside the scope of the highway project, thereby potentially permitting appellee to recover enhanced value for its property, when the SMP

> was an integral part of the highway project and appellee likely knew that his property would be taken for the SMP, at the time [the SRC] committed to the project?

for the reasons discussed below, we conclude that the SRC legally used its quick-take powers to condemn appellee's property. Therefore, we answer the first question in the affirmative. Nevertheless, we are of the view that the circuit court's factual findings were clearly erroneous with respect to whether the SMP was within the scope of the highway project for purposes of valuation. Accordingly, we shall reverse and remand the case for further

[1]

proceedings consistent with this opinion.

Factual Background

A joint County and State project ("the Project") began in the mid 1980s to revitalize Damascus and improve traffic flow and safety near Damascus Centre, a shopping center in the business district of Damascus. The Project included modifications to the intersection of Routes 108 and 124, the widening of Route 108 between Routes 27 and 124, and the extension of Route 124 by 1100 feet.

Route 108 runs in an east-west direction through the Damascus business district. Route 108, westbound, is intersected by Route 27, which runs in the north-south

direction. Prior to construction, Route 108, eastbound, was intersected from the south by Route 124, which terminated at its intersection with Route 108. Appellee's parcel is located northeast of the Routes 124 and 108 intersection. The southern end of Damascus Centre traverses Route 108, and its eastern edge is located near the intersection of Routes 124 and 108.

Prior to the construction, the only access to the shopping center was on Route 108. Additionally, stormwater runoff from the shopping center and commercial buildings along Routes 27 and 108 drained into the shopping center parking lot and flowed through a pipe into a manmade SMP that was located adjacent to appellee's parcel, 600 feet north of the Routes 108 and 124 intersection, on property owned by Dr. Richard Schoeb. When the water in the SMP reached a certain height, it was automatically discharged out of

[2]

the SMP through an "outfall" pipe. The water then naturally flowed downhill onto appellee's property, where it formed the source of a stream.

Plans for the Project were based, in part, on the Maryland-National Capital park and Planning Commission's Master Plan for Damascus. In 1966, the Master Plan proposed the extension of Route 124 northward from its terminus at

Route 108 and its eventual connection to Route 27. The plan provided, in part:

> **THE PLAN SERVES AS A GUIDE**
>
> . . . *The plan serves as a guide to aid public officials which are responsible for guiding development and providing public facilities.* The plan also enables private developers to design their individual projects to fit into a rational plan of development for the entire Damascus community.

(Boldface and capitalization in original; italics added).

The "Damascus Master Plan as Amended to May 5, 1971" also mentioned the Route 124 extension and its connection to Route 27. It provided, in part:

> Although reservations of land for rights of way and public facilities are necessary to insure that the land will be available when needed, it is essential for economy that building of these facilities await such time that their construction can be justified by need.
>
> The construction of the entire highway network shown on the plan could not be justified by today's needs nor those of the immediate future. However, anticipated growth of the region will create a need for these highways in the future.

In 1978, appellee purchased his 32.5 acre parcel and was granted the following easement for access to the proposed extension of Route 124:

> Together with a perpetual right of easement as a means of unlimited access for vehicular and pedestrian traffic from the [32.5 acre plot] unto Maryland Route 124 and
>
> [3]
>
> proposed A-5, over that parcel of land to be conveyed by said James C. Dulin [unto] Richard J. Schoeb, et al., containing 4.94622 acres and to be recorded among the land records of Montgomery County.[1]

In 1985, Montgomery County and the SRC entered into the first of three Memoranda of Understanding ("MOU")[2] concerning plans for road construction in downtown Damascus. The 1985 MOU provided that Routes 108 and 27 would be widened near their intersection and that the construction would be funded by private developers and the MSHA. The MOU also provided for an extension of Route 124 and its terminus with Route 108, which would "follow the Master Plan Route A-12 alignment for approximately 600 to 700 feet to provide an alternative access to Damascus Center." Preliminary cost estimates were to be prepared by the Montgomery County Department of Transportation ("MCDOT").

The August 1987 amendment to the MOU provided that the Project would proceed in four phases: Phase I

involved the widening of Route 108 westbound between Routes 124 and 27; Phase II involved improvements to the Routes 108 and 124 intersection; Phase III involved an extension northward of Route 124 for 500 to 600 feet; and Phase IV involved the further extension of Route 124 northward to connect with Route 27. The August 1987 Amendment further provided that the State would design, construct, and fund

---

[1] "Proposed A-5" referred to the parcel that was conveyed to Dr. Schoeb and later formed the roadbed for the Route 124 extension. "A-5" was later redesignated as "A-12."

[2] The Montgomery County Department of Housing and Community Development and the Montgomery County Department of Transportation both participated in the MOU.

Phases I and II. On the other hand, the SRC was to design and construction Phase III, with reimbursement by the County for all expenses. The Amendment provided that "[d]esign is funded for FY 88 and construction is scheduled for FY 92." Neither the 1985 MOU nor the 1987 Amendment mentioned the necessity for storm water management.

In 1988, the SRC held a public meeting at which it presented drawings and a tentative design plan for the

proposed 600 foot extension of Route 124. By March 1989, the SRC had located two proposed sites for stormwater facilities to accommodate runoff from the improvements to Route 108 and the Route 124 extension. A March 1989 memorandum from a senior planning specialist at the Department of Housing & Community Development ("DHCD") to the Director of the Upper Montgomery County Service Center noted that one of the proposed sites was on the southeast corner of the Routes 108 and 124 intersection and the other was on the Damascus Shopping Centre property "near its Main Street frontage." The memorandum stated, however, that neither site was acceptable. It provided, in part:

> An objective of the Damascus Revitalization Program is infill commercial development on the shopping center's Main Street frontage or, at the very least, parking to serve Main Street. The owner of the center, Cynwyd Investments, is in accord with the objective of infill development and has retained an architect to develop a retail design proposal.
>
> DHCD has indicated to MSHA that the proposed [stormwater management] facility locations are not optimal. MSHA has stated it has directed its consultants to see if there are other suitable locations.
>
> In the meantime, DHCD is also seeking recommendations for [stormwater manage-

ment] facility locations which do not conflict with revitalization aims.

[5]

Time is of the essence in order not to delay MSHA's design schedule. DHCD requests that under the auspices of the Upper Montgomery County Service Center, a meeting of other agencies and parties with an interest in [stormwater management] in the area, be convened to explore alternative locations.

Possibilities are that [stormwater management] plans prepared by Dewberry and Davis for Cynwyd* and/or plans that DOT will be designing for the remainder of MD Route 124 could incorporate MSHA needs.

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* *Approximately two years ago, plans were prepared for Cynwyd for an off-site facility to the east of their site on a parcel owned by WJM Realty, Inc. The County was interested in participating in this facility to provide retention serving a larger area.* Cynwyd submitted drawings and calculations to DEP. *However, the owner of the proposed site, William J. Miller, ultimately refused the use of his parcel. Should this site be suitable for MSHA needs, we need to know what tools can be used realistically to acquire the site, over the objections of the land owner.*

(Emphasis added).

Thereafter, Dr. Schoeb offered to donate a right of way to the County to build the proposed extension on his land, if the SRC would agree to an additional 400 to 500 feet to the extension. He wanted to obtain access to Route 124 for the northern portion of his property.

In October 1989, based on the County's recommendation, the State directed its engineering consultant to assess the possibility of locating a stormwater management facility on "the Library Center Property" that was located northeast of the Routes 108 and 124 intersection. The State's engineering consultant submitted a Preliminary Stormwater Management Report in November 1989 to the Maryland Department of the Environment ("MDE"). It proposed a SMP

[6]

designed to accommodate a drainage area of 7.70 acres.[3]

In January 1990, as a result of Dr. Schoeb's offer, the SRC, at the County's bequest, began to design plans to lengthen the proposed Route 124 extension. But because the extension of Route 124 to that location would destroy the shopping center's existing SMP on Dr. Schoeb's property, the SRC determined that appellee's property was the most appropriate site for a new SMP. The State sought to accommodate the approximately eight acres of drainage area from the highway improvements. In a letter to the SRC dated

February 7, 1990, the County stated that it planned to acquire the necessary land for the new SMP by obtaining an easement from appellee. The letter provided, in part:

> The County does not acquire stormwater management areas on undeveloped property in fee simple. It is our experience that, when these properties are developed, the then inplace stormwater management pond requires modification and/or relocation to satisfy the proposed site plan. The County will obtain a perpetual easement from William K. Miller Realty, Inc. for the purpose of construction and maintaining the proposed stormwater management pond.

In a June 1990 memorandum, the Manager of the Stormwater Management Division of the Montgomery County Department of Environmental Protection informed another County employee that, if the shopping center's SMP on Dr. Schoeb's property were destroyed, "stormwater management must be provided in an alternative structure." In July 1990, the State's engineering consultant

---

[3] The drainage area included: 1.76 acres from Route 108, 0.72 acres from the proposed 600 foot Route 124 extension, 1.56 acres from "other impervious area," and 3.66 acres from meadow, woods and grass.

submitted its Final Stormwater Management Report to

MDEP, which increased the size of the SMP to accommodate a drainage area of 9.87 acres.[4] The proposed SMP was not designed to receive water that flowed into the shopping center's existing SMP on Dr. Schoeb's property.

In August 1990, the County and the SRC began negotiations with appellee concerning the construction of a SMP on appellee's property. On August 3, 1990, William J. Miller, Jr. wrote to the SRC, on behalf of WJM Realty, submitting an outline of a proposed agreement concerning the location of the SMP. The letter provided, in part:

> 1. The State and County's timeframe [sic] for construction of A-12 should remain on course.
>
> 2. It is desirable for both environmental reasons and town center development that the storm water management facility be construction in conjunction with the extension of [Route 124] and handle as much of the storm water runoff from the thirty five (35) acre drainage areas as possible.
>
> 3. The movement of the storm water management facility further downstream and above all wetland areas, as proposed by consultants . . . is desirable because the relocated facility would significantly improve storm water management in the region

by handling all storm water runoff generated from the thirty five (35) acres within the drainage area versus the seven (7) to eight (8) acres of storm water runoff which would be managed by the facility as currently planned.

4. . . . . The property owner ("owner") will provide a temporary easement so as to enable MCDOT and [the SRC] to achieve the required permit [to build a

---

[4] The drainage area included: 1.93 acres from Route 108, 1.34 acres from the extension of Route 124 approximately 1100 feet, 1.52 acres from "other impervious areas," and 5.08 acres from meadow, woods and grass.

temporary SMP] with the understanding, however, that MCDOT and SHA will cooperate fully and assist in expediting all required permits for the relocation of the storm water management facility downstream. Additionally, MCDOT and SHA will assist the owner in obtaining funding through sources of State and County [sic] for the necessary engineering, design work and construction required

for the relocation of the storm water management facility.

* * * *

6. MCDOT and [the SRC] shall provide the owner with a reasonable and ample, at grade, point of ingress and egress to the owner's property, in such a location which avoids any wetland impact.

On August 23, 1990, after further negotiations, the SRC wrote appellee, proposing new terms for an agreement between the parties. The letter provided, in part:

2. WJM Realty will convey to the [MSHA] a revertible easement over the 1.118 acres where the pond is presently planned to be located. The easement will authorize the [MSHA] to construct sediment control facilities in this area during the initial stages of construction and maintain these as needed. It also will authorize the Administration to construct a permanent pond at this location during the ending months of our construction project, in the event you are not successful in your effort to obtain the permits and/or construct the alternate pond within a time period yet to be specified, but at least several months prior to the end of our construction project.

3. If you are successful in getting the alternate pond construction, WJM Realty, Inc. will waive all compensation from the [MSHA] for this project

. . . .

4. *If you are not successful in constructing the alternate pond, the [MSHA] will offer to pay you the appraised fair market value for the land and resultant damages, if any.*

4A. *If agreement cannot be reached on a selling price, the [MSHA] will file a condemnation suit to acquire fee title or a permanent easement over the area.*

* * * *

5. W.J.M. Realty, Inc., its successors and assigns, will agree to prepetually [sic] receive the storm

water from Routes 108 and 124, and maintain the alternative pond in accordance with all applicable State and County standards and specifications.

In response, on September 11, 1990, Miller wrote to the MSHA, stating that appellee would not "agree to maintain the alternate pond" as requested by the SRC. Appellees stated that "this responsibility should rest solely with the [MSHA] and/or Montgomery County."

During a public meeting in the Fall of 1990, while negotiations between the SRC and appellee were ongoing, the final design plan for the 1100 foot extension of Route 124 was presented. The drawings included the location of a SMP on appellee's property that was 1.118 acres in size.

On February 15, 1991, Dr. Schoeb and the County entered into a Right-of-Entry Agreement that provided that, upon completion of the 1100 foot extension to Route 124, Dr. Schoeb was to convey to the County the necessary right-of-way in fee simple. Then, on March 15, 1991, the State's engineering consultant submitted a revised Stormwater Management Report to MDEP, proposing a SMP designed to accommodate a 32.40 acre drainage area that included the shopping center.[5] The engineering consultant submitted the following letter along with the report:

> Due to the proposed roadway improvements to MD 124, an existing pond, to which runoff from an existing shopping center outfalls, will be filled in. *In accordance with an agreement with Montgomery County, MSHA directed [us]*

[5] The drainage area included: 2.06 acres from Route 108, 1.34 acres from the proposed 1100 foot extension of Route 124, 15.90 acres from "other impervious areas," and 13.10 acres from meadow, woods and grass.

[10]

> *to redesign our pond to incorporate the existing shopping center area, along with the 108 and 124 project.*
>
> * * * *
>
> *[T]he pond had to be relocated further north and enlarged to accommodate the existing shopping center.*

(Italics added.)

Thereafter, on August 1, 1991, although negotiations continued between appellee and the SRC, the SRC filed an "informal" petition in the circuit court to quick-take 1.118 acres of appellee's land for the purpose of building an SMP located along the Route 124 extension. On September 10, 1991, the State and County drafted a second amendment to reflect that the length of the Route 124 extension would be approximately 1100 feet. The Water Resources Administration of the Maryland Department of Natural Resources subsequently approved the State's stormwater management plan[6] in connection with the Route 124 extension.

On April 14, 1992, the State entered into a contract for construction of the SMP and issued a notice to proceed with construction on April 28, 1992. On May 14, 1992, the SRC amended its petition to move the SMP further north, to include a .036 acre revertible easement, and to reduce the size of the pond to 1.074 acres.[7] Thereafter, in the summer of 1992, negotiations broke down

---

[6] COMAR 26.09.02.03(19) defines "stormwater management plan" as,

> a set of drawings or other documents submitted by a person as a prerequisite to obtaining a stormwater management approval, which contain all the information and specifications required by an approving agency.

[7] The State later explained that the design plan for the SMP was changed in order to allow appellee more frontage along the Route 124 extension.

between the parties concerning the SMP, primarily because they could not agree upon a location for it.

Appellant's formal condemnation petition, dated July 16, 1992, provided, in part:

> 4. That the *purpose* for which the said land and property above described is sought to

> be condemned is for the *construction, reconstruction, improvement, maintenance and completion of the State System of Roads and Bridges, and designated as Maryland Route 108 from Maryland Route 27 to Maryland Route 124, in Montgomery County.*
>
> 5. That [the MSHA] is unable to make an agreement with [appellee] to purchase the above property, notwithstanding the fact that [the MSHA] has made a reasonable and bona fide effort to do so, and it is, therefore, *necessary* that the property described, together with any buildings or improvements thereon, if any, and the interests of [appellee] therein be required by condemnation.
>
> 6. . . . That [the MSHA] states that it is *in the public interest and necessary to take possession of the land and improvements as soon as practicable* . . . .

(Emphasis added).

By August 1993, construction of the Route 124 extension and the new SMP was completed. The SMP was built to manage stormwater run off from 32.4 acres, including approximately three acres generated by the road improvements along Route 108, as well as the water that previously flowed into the shopping center's former SMP.

During the legal proceedings, the SRC filed a motion *in limine*, seeking to prevent appellee from introducing evidence that the value of its property should be enhanced by the anticipated

[12]

effect of the Route 124 extension. Pursuant to Md. rule 2-502[8], the SRC also filed a motion for separation and decision of a question of law concerning whether a public necessity existed for the taking of appellee's land.

For its part, appellee moved to dismiss the SRC's condemnation petition, claiming that the quick-take proceeding was "an illegal, unauthorized proceeding," because it did not serve a "State highway construction purpose" within the meaning of Md. Code. Trans. Art. ("Tr."), § 8-313. Appellee also filed a "Cross Motion for Ruling on a Separate Question of Law," seeking a ruling that (1) the SMP was a separate project from the Route 124 extension; (2) appraisers could consider the property's proximity to the Route 124 extension in valuing appellee's property; and (3) appraisers could consider the SRC's "denial and limitation of access and road frontage on Route 124 extended" in assessing damages to appellee's remaining

[8] Md. Rule 2-502 provides:

> If at any stage of an action a question arises that is within the sole province of the court to decide, whether or not the action is triable by a jury, and if it would be convenient to have the question decided before proceeding further, the court, on its own motion or on its own initiative, may order that the question be presented for decision in the manner the court deems expedient. In resolving the question, the court may accept facts stipulated by the parties, may find facts after receiving evidence, and may drawn inferences from these facts. The proceedings and decisions of the court shall be on record, and the decisions shall be reviewable upon appeal after entry of an appealable order or judgment.

[13]

property.[9]

A. The Proceedings Below

1. January 1995 Evidentiary Hearing

During a two day consolidated motions hearing in January 1995, the SRC argued that it acted properly in quick-taking appellee's property for construction of the SMP. The SRC acknowledged that the Route 124 extension is a County road. Nevertheless, it maintained that it has broad statutory

power to improve roads in Maryland and often works together with local jurisdictions on highway projects, in order to accomplish its mission. The SRC explained that State and county roads comprise an interconnected network of roads in Maryland and that ownership and responsibility for the maintenance of State and county roads routinely transfers back and forth between the entities. In particular, the SRC asserted that when the extension of Route 124 to connect with Route 27 is completed, responsibility for its maintenance will transfer to the State.

The SRC claimed that a "public need" existed for the taking of appellee's land, in that construction of the Route 124 extension served the public because it improved traffic flow along Route 108 and provided a safer entrance into the shopping center and County buildings. The SRC essentially contended that, because there was a public purpose for building the Route 124 extension, the

---

[9] On January 11, 1995, appellee filed a third party complaint against Montgomery County. The court subsequently granted the County's motion to dismiss. This ruling is not the subject of this appeal.

construction of the SMP also served a public purpose, in light of Maryland law requiring it to effectuate stormwater management[10] whenever it builds roads. The SRC added that it was required to replace the SMP that was destroyed by the construction of the Route 124 extension and to accommodate the water from the highway construction. The SRC also averred that its decision as to the necessity for the SMP is not subject to judicial review because it was not "so oppressive, arbitrary and unreasonable as to suggest bad faith."

Additionally, the SRC argued that the value of appellee's property should not be enhanced by the prospect of the Route 124 extension, because the taking of appellee's property was within the scope of the SRC's project to build the extension. The SRC claimed that the taking of appellee's property for a SMP was foreseeable in light of the Master Plan and State law requiring stormwater management. The SRC acknowledged, however, that while the Route 124 extension appeared in the 1966 Master Plan and its 1971 amendment, stormwater management was not mentioned. Nevertheless, the SRC contended that these dates did not constitute the date of commitment to the project, because master plans are only general guides for development and often change over time. Rather,

[10] COMAR 26.02.02B(18) defines "stormwater management" as

> (a) Quantitative control, a system of vegetative and structural measures that control the increased volume and rate of surface runoff caused by man-made changes to the land; and
>
> (b) Qualitative control, a system of vegetative, structural, and other measures that reduce or eliminate pollutants that might otherwise be carried by surface runoff.

[15]

according to the SRC, the State did not commit to the project until either August 1991, when it filed its original informal petition to condemn appellee's land, or April 14, 1992, when it accepted a bid on a contract for construction of the road and the SMP.

In contrast, appellee argued that the State lacked authority to condemn appellee's land for a stormwater management facility related to the construction of a County road. Moreover, appellee contended that construction of the SMP was not necessary, because the SMP traversed most of the parcel's frontage along Route 124 primarily served private interests and was much larger in size than was needed to

accommodate runoff from the highway improvements.

Further, appellee claimed that construction of the SMP was a separate project from the highway construction, because more than twenty years had passed between the time when the road first appeared in the Damascus Master Plan and 1990, when appellee's land was identified for the SMP. Thus, appellee contended that appraisers should value its property based on its proximity to the Route 124 extension. Additionally, appellee contended that the construction of the SMP destroyed its ability to develop its land for commercial use, because the SMP and a guardrail and embankment with a 15 to 20 foot slope separated the pond and the road.

Randy Paul, the SRC's Engineering Systems Team Manager, testified that the County reimbursed the State for the cost of construction and designing the Route 124 extension. Nonetheless, Mr. Paul testified that construction of the Route 124 stub was a

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State project, because "we designed it and we advertised it and we built it" without any participation from the County. Mr. Paul also stated that Route 124 was primarily built for safety purposes. He explained:

> One of the safety issues that the County and State worked on was a high accident count at the intersection of the Damascus Shopping Center and the Citizens Bank on the corner of [Route] 124.
>
> In order to resolve those accidents or to provide an alternate access and deny left turn movements off of Route 108 into those businesses . . . the [Route 124] stub was the best answer.

Mr. Paul also stated that the SRC investigated appellee's alternative proposed site for the SMP, but "never received any computations to show that it would work there." He added that, even if the Route 124 extension had not been built, the SRC would have needed to build a SMP to accommodate runoff from the State's improvements to Route 108. He conceded, however, that the size of that SMP would have only needed to be "about half as big as the one we built."

Martin Covington, the SRC'S expert in water resources engineering, testified that, before construction of the Route 124 extension, the shopping center's SMP had accommodated 29.6 acres, which included water from the shopping center and commercial buildings along Routes 27 and 108, which drained naturally into the shopping center's parking lot. Mr. Covington explained that the new SMP accommodates 32.4 acres, including all the water that had drained into the old

SMP, as well as water from an additional three acres near the intersection of Routes 108 and 124.

Mr. Covington explained that several factors must be

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considered in selecting the best placement for a SMP. He said:

> Well, a lot of factors go into play. You want to located the pond on undeveloped property. You have to get enough volume to be able to manage the two and ten year storm at least in Montgomery County. . . .
>
> You need to provide some water quality improvements which is a separate issue. And you need to have access to it.
>
> You need to stay out of wetlands areas . . .
>
> And it's always best to locate [an SMP] the lowest place you can find because obviously water runs downhill and it's easiest to put the facilities in a place where you can get the water to go to.

Mr. Covington added that, based on the above criteria, the SRC determined that the site selected for the new SMP was the best place for a stormwater management facility. He noted that appellee's property is the site of the most natural drainage in the area and that it would have been very difficult too move the SMP further north, because it would impact wetlands. Mr. Covington acknowledged, however, that the

SMP is designed to handle a one hundred year flood, and he did not know why it was designed for such a large volume of water. Mr. Covington also maintained that, while the SMP collects water from various developed properties, it does not constitute a "regional facility," because regional facilities generally accommodate enough water to sustain a flowing stream. Mr. Covington explained that the SMP held enough water to begin a stream, but its volume was insufficient to maintain a constant flow.

Richard Ravenscroft, a "Right-of-Way Agent" for the SRC, testified that the State and County commonly collaborate on construction projects. He said that the SRC decided to condemn appellee's property, because it was unable to reach an agreement

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with appellee concerning the location of the SMP. Mr. Ravenscroft also said that, before the additional footage was added to the Route 124 extension, the SRC had initially planned to build a half acre SMP on appellee's property to accommodate storm water run-off from the highway improvements in downtown Damascus.

Mr. Ravenscroft said that the Millers attended the public hearing in 1988, at which the SRC presented its preliminary designs to extend Route 124 approximately 600

foot. He testified that, during initial hearings like the one in 1988, the State ordinarily

> shows the conceptual stage of the project with this is what the road would look like if we continued the design, it would show the number of lanes, curbs, sidewalks, landscape areas -- those types of improvements.

He also stated that, during this type of conceptual meeting, the location of stormwater management projects is generally depicted on the drawings. Nevertheless, he said that in 1988, the SRC was aware of the need for stormwater management related to the extension of Route 124, but added, "I can't tell you whether that was on those original drawings [presented during the 1988 meeting] or not."

Kenneth O'Connell, a civil engineering and expert witness for appellee, testified that, based on his review of the State's construction plans and design calculations for the SMP, the SMP constituted a regional stormwater facility, because it has "quantity and quality controls," and serves private off-site properties. Mr. O'connell said that stormwater management facilities are usually built downstream, instead of at the source of the stream. Mr. O'Connell also opined that the SRC did not need

to build a SMP in order to accommodate water from construction along Routes 108 and 124. He explained that, instead, the SRC could have obtained a waiver for quantity controls and could have used an existing "infiltration structure" along Route 108 to accomplish quality controls.

Appellee also offered the deposition testimony of Robert C. Merryman, the Deputy Director of MCDOT, who had attended early negotiations between the SRC and appellee concerning the SMP. Mr. Merryman opined that the SMP, as constructed, constitutes a regional stormwater management facility. He acknowledged, however, that while the State was responsible for designing and constructing the SMP, the County helped to determine the location for the SMP, because the County had several interest in the SMP's construction, including,

> community concerns regarding storm water management, the [County's project to improve downtown Damascus], the extension of [Route 124], and facilitating the streets, construction of the state project. We were very interested in seeing that project moved forward in a timely fashion. . . .
>
> * * * *
>
> There are some requirements of the county government, . . . borne out through the state legislature requiring that the county provide or require when development occurs that there be mitigation of the run-off to

protect the waters of the State of Maryland.

Additionally, appellee submitted the March 1989 memorandum between the County employees. At the conclusion of the hearing, the court took all matters under advisement.

2. March 1995 hearing

The motions hearing continued on march 14, 1995. The court then granted, in part, the SRC's Motion for Separation and

[20]

Decision, ruling that the Route 124 stub was built for a public purpose. The court said:

> [The Route 124] is in every sense of the word, without exception, a county road. The county has paid for it, the county alone owns the right to construct it along that pathway, and the county will maintain it.
>
> The question that is raised here is, what in the world is the state doing building a county road. And that is one of the major issues. And that issue is resolved that the state is within its rights and it is a public use that serves the public sufficiently for the state and county to cooperate in this endeavor and that there are two major benefits that the state and all the citizenry of the state get from the state proceeding as it has proceeded which are sufficient to justify the state using the power of imminent [sic] domain, if it needs to do so,

to build the road, even though its number one purpose is to serve a private purpose.

The ruling of the Court is that the *600 feet that links up . . . is sufficient for state purposes for two-and-a-half reasons.*

The first and primary reason is there is master planned a state road and a state roadway system. And the state has an opportunity without cost to build a segment of the road and to get it built without cost to the state. That is a monumental benefit to the state, and the state grabs it and appropriately so.

Secondly there is the 108 left turn situation which is a benefit to the state because it enables the state to eliminate the left turn at 108. . . .

* * * *

[With respect to the second 500 feet, w]e don't have the 108 situation, but we still have the number one and major consideration what was true with regard to the first 600 feet and which is also true of the other 500 feet . . .

The state has farmed out its expertise and its building people for which it is compensated. *And ultimately at no cost to the state it also has in place another 500 feet of this state road that is ultimately going to connect up and the state hasn't had to pay for it, which in the scope of things makes it more likely that the remainder of the road can be accelerated* since a portion is there and there is more driving force just by virtue of what is

> there so that the state probably has a very strong argument, and so does everyone else, for moving up the timetable for [the building] of the remainder of the road.
>
> That is enough. And this Court holds that . . . *it is a little bit suspect when private interests drive*

[21]

> *state action for the benefit of private interests.*

(Emphasis added).

But the court withheld ruling on whether the taking of appellee's land for a SMP served a public purpose or constituted a public necessity.[11] The court took special notice, however, of the contents of the 1989 memorandum between two County employees, which he termed a "smoking gun." The court believed that this memorandum provided that, at the request of Cynwood Investments, the County tricked the State into improperly using the State's power of eminent domain to benefit private interests. The court said:

> The state was an innocent party, interested in getting a road for nothing. The county and the department was [sic] carrying water for Sinwood [sic]. And largely on behalf of Sinwood, because Sinwood couldn't get it privately over the bargaining table. . . .
>
> * * * *

> [W]e aren't talking condemnation now, we are talking constitutional rights and damages for invading basic constitutional protections and corrupting the process to use the power of eminent domain for a private purpose wholly wrong when that private entity could not get what they were seeking at the bargaining table.

The court also noted that the size of the SMP was much larger than necessary to accommodate runoff from the State roads project. The court said:

> First, the storm drainage area is more than four times as great as that was needed for the State Roads project. . . . And that is true even after you figure that the extra 500 feet is going to require you to eliminate what has been serving in the meantime as a sort of natural pond, small natural pond, for the accumulation of drainage.

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[11] At various times, the court used the term "public necessity" when it was actually referring to "public purpose." As we discuss, *infra*, these terms are not synonymous.

> And when you eliminate that in the construction of the extra 500 feet you are going to have to do something about that. But it doesn't mean that you set up what is appropriately called . . . a regional facility."

In ruling on appellee's motion for separation of law, the court determined that construction of the Route 1254 extension and the SMP must be considered as separate projects for the purpose of valuation, and that appraisal of appellee's land must take into account its proximity to the Route 124 extension. In so ruling, the court pointed out that the Route 124 extension had been in the Master Plan for more than twenty years and that the need for stormwater management was not mentioned until at least twenty years after the road extension appeared in the Master Plan. The court noted that land developers generally rely on master plans in deciding whether to purchase a parcel of land and that the existence of appellee's easement in its 1978 deed demonstrated that it purchased the property based on the expectation that Route 124 would eventually be extended northward to connect to Route 27. The court said:

> The road is mentioned in that easement which well precedes 1985, and that establishes that project was being relied upon by intelligent business people who were buying land then. . . . [A]nd there is nothing, nothing that refers to any storm drainage. It is clear to me that the storm drainage came as an afterthought.
>
> * * * *
>
> There are two reasons . . . for why this easement legally is important. It fixes a time

> other than the Master Plan when reliance was being placed on this road and actions were being taken on the land records. . . .
>
> * * * *
>
> The easement is also important because it is clear that the Millers would never have purchased this property without the easement.

The court also based its ruling with respect to the scope of

[23]

the highway project on its earlier determinations that the SMP was unnecessary to accommodate runoff from the State's road construction and that the State had been coopted by the County to build, unknowingly, the SMP for private interests.

The court declined to decide whether appraisers could take into account damages to appellee's remaining land. It commented, however, that

> severance damage is appropriate including diminution of the loss of value, or the difference between the value before that drainage facility was built and the value after it was built of the land that was condemned to build it.
>
> And since it has effectively -- from a developer's standpoint it has not only taken most of the frontage, which indeed it has, but from a development standpoint it has left the developer with nothing in terms of frontage because it has created a major eyesore . . . which presumably would be in the view of

anyone who would purchase what ultimately is developed there.

Further, the court "held in abeyance" its consideration of appellee's motion to dismiss.[12]

c. May 1995 hearing

At the conclusion of the May 25, 1995 hearing on appellee's motion to dismiss, the court took the matter under advisement.[13] The court indicated, however, its inclination toward dismissing the

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[12] The court also ruled that appellee is entitled to damages for the loss of his easement and that appellant's petition should be amended to include the easement. There is nothing in the record indicating that the SRC ever amended its petition as requested by the court, and the parties have not raised this issue on appeal.

[13] The court apparently sought to give appellee an opportunity to withdraw its motion to dismiss, because the court was concerned that granting appellee's motion would serve to prevent appellee from receiving compensation from the State.

State's petition, based on its determination that the SRC lacked the authority to quick-take appellee's land for the SMP, because appellee's land was sought for the County and Cynwood Investments. Therefore, it did not constitute a

"State highway purpose" within the meaning of Subtitle 8 of the Transportation Article. The court told the SRC,

> *[Y]our authority, . . . [to exercise the power of eminent domain] is for State highway purposes, and I am suggesting to you that you did not do this for State highway purposes, you did it to serve a private stormwater purpose of Sinwood [sic] and you also did it to serve a greater interest of Montgomery County.*
>
> *If there is a right of condemnation for a stormwater drainage facility to serve a regional need, including Sinwood, that power does not lie with you.* It lies with someone else. It was wrong for you to exercise this power in this way.

(Emphasis added).

The court also suggested that the SMP did not serve a public purpose or constitute a public necessity. It said:

> I remain of the view, based upon the evidence that we heard, that *this project undertaken by the State so exceeded the State's authority to condemn for drainage required by its road project. . . that it was not used for a purpose of public necessity within the purview of the State Highway Administration's authority to condemn* -- it may have been within the authority of others, but the Highway Administration may not lend out its eminent domain powers to be exercised by others who have eminent domain powers.

> *This is not a power to be kicked around or to be traded back and forth. If you have the power, you exercise it. The State has the power in connection with roads. . . [T]his stormwater drainage facility was a facility to serve much, much more than the roads themselves.*

(Emphasis added).

4. The court's August 1995 memorandum decision

On August 29, 1995, the court issued its memorandum opinion.

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It provided:

> *Plaintiff State Roads Commission of the State Highway Administration seeks to condemn land of one private owner to serve developmental purposes of another private owner. This is an impermissible use of the public power of eminent domain. Moreover, land taking (quick take) for regional storm drainage is beyond commission authority.*
>
> Evidence, including testimony, topographical maps and other exhibits, discloses serious traffic and drainage problems assumed by Cynwyd Investments in building its Damascus Shopping Center (Centre). Plaintiff solves Cynwyd's traffic problem by its long planned design and subsequent construction of road improvements to Maryland Route 108 and the intersection of

Maryland Routes 108 and 124 and by a stub extension of Route 124.

To solve its drainage problems, Cynwyd, with assistance from Montgomery County, Maryland, sought a regional storm drainage facility on land owned by Defendant WJM Realty, Inc. (William J. Miller). Because the facility would have disastrous consequences to developmental usage of defendant's frontage on the newly constructed stub, defendant "refused the use of his parcel."

As designed and contemplated by plaintiff, the road improvements would utilize land taken from Cynwyd and one other source for two storm water management facilities to satisfy drainage requirements of the road project. prompted by Cynwyd, Montgomery County proposed to plaintiff that Cynwyd's land not be taken but that defendant's site be acquired "over objection of the owner" "to provide retention serving a larger area" including Cynwyd's shopping center. Plaintiff seeks here to do so.

Defendant presses the pending motion to dismiss these condemnation proceedings. For the reasons stated in open court [in March 1995] and on May 25, 1995, this court concludes the motion should be granted because *the acquisition here constitutes an illegal and unauthorized usage of the public power of eminent domain.*

(Emphasis added).

On September 8, 1995, the court granted the SRC continued possession of appellee's land pending its appeal.

Discussion

I.

[26]

As we have observed, the court determined that, although the construction of the Route 124 stub served a public purpose, the taking of appellee's land for a SMP lacked a public purpose, because it was built to serve the private interests of Cynwood Investments and the County. the court also believed that the SMP was not necessary in view of its size. Thus, the trial court dismissed the SRC's condemnation petition based on its conclusion that the taking of appellee's land for the SMP was an impermissible use of the SRC's power of eminent domain. He reasoned that the SRC lacked the authority to condemn property, on behalf of the County, for a regional SMP. But we agree with the SRC that the trial court erred in dismissing its condemnation petition, because the taking of appellee's land for the SMP was a proper exercise of its power of eminent domain.

A. The SRC was authorized by statute to condemn appellee's land

Appellee argues that the SRC lacked authority to quick-take appellee's land for a SMP that served County and

private interests, because the SRC's quick-take authority is limited to property that is taken for State highway purposes.[14] Conversely, the SRC

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[14] Appellee also claims that the quick-take of appellee's land was beyond the County's quick-take authority, because the Maryland Constitution and Title 8 of the Transportation Article do not grant the County that power. Based on our determination that the State possessed the power to quick-take appellee's land for the SMP, we shall not address the bounds of the County's quick-take authority. We note, however, that Tr. § 8-218(b) provides,

> (b) *"Quick-take" condemnation exclusive in Commission.* -- Only the Commission may exercise the condemnation powers and duties vested in it by Article III, § 40B [the quick-take provision] of the State Constitution.

contends that it possessed statutory authority to quick-take appellee's land because, pursuant to the Maryland Constitution and the Annotated Code of Maryland, the SRC may quick-take property for "any highway purpose."

The power of eminent domain is the authority of a governmental body to take property for a public purpose without the consent of the owner so long as just compensation is paid. 1A Nichols on Eminent Domain, § 3.01 (3d. 1996). Section 40 of Article III of the Maryland

Constitution provides:

> The General Assembly shall enact no Law authorizing property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the part entitled to such compensation.

Moreover, the Fifth Amendment to the U.S. Constitution, as applied to the states through the Fourteenth Amendment, forbids the taking of private property for a public purpose without just compensation. *King v. State Roads Comm'n of State Highway Admin.*, 298 Md. 80, 83 (1983); *Lore v. Board of Public Works*, 277 Md. 356, 358 (1976).

In "conventional condemnation cases," the condemnor may not take possession of the property until the issue of damages has been adjudicated and the condemnor "pays the full amount of the condemnation judgment, plus costs." *King*, 298 Md. at 84-85. On the other hand, in "quick-take condemnation" cases, the condemnor acquires possession of the property before trial upon payment to the court of the estimated value of the subject property.[15] *King*,

[15] In *King*, the Court explained that,

> [t]he condemnee may immediately withdraw the (continued)

298 Md. at 85-86.

State governments possess an inherent right to condemn property. "This authority 'springs from . . . a necessity of government,' and is considered to be an essential attribute of sovereignty." Nichols, *supra*, § 3.01[1] (citations and quotations omitted.) See also *Shreve v. City of Baltimore*, 243 Md. 613 (1966); *Heubschmann v. Grand Co.*, 166 Md. 615 (1934); 29A C.J.S. *Eminent Domain*, § 21, at 132 (1992). The power to exercise eminent domain is exclusively reserved for the legislature. 29A C.J.S., *supra*, § 21 At 132. The legislature's power of eminent domain lays "dormant," however, until it enacts a statute setting forth the instances and procedures for its exercise. *Id.* The legislature may decide to use its power directly or to delegate its power to public offers or entities, or to a political subdivision and agencies within the state. *Id.*, §23 at 134.

When a state legislature confers the power of eminent domain by statue, it is the role of the courts to determine

whether the use of that authority is consistent with the statutory grant. 26 Am. Jur.2d, *Eminent Domain*, § 20 at 465-662. Statutes conferring the authority to condemn property are generally constructed strictly in favor of the condemnee. *David v. Bd. of Education of Anne Arundel County*, 166 Md. 118, 120 (1933); 26 Am. Jur.2d. *supra*,

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[15] (... continued)
amount of the quick-take deposit and may also recover the amount of any deficiency where the value of the property is later determined at trial to be greater than the amount initially deposited by the condemnor.

§ 20, at 465-66; 29A C.J.S., *supra*, § 23 at 134. Nonetheless, the rule of strict construction does not prevent courts from construing statues reasonable with regard to their legislative intent. *Davis*, 166 Md. at 120; 26 Am. Jur.2d, *supra*, § 19 at 464; 29A C.J.S., *supra*, § 23 at 135. In *Davis*, the Court of Appeals explained that,

> [w]hile [e]minent domain statutes should be strictly construed, *the purpose and intention of the legislature, when clearly manifested in the statue should not be defeated by any narrow, strained, forced or artificial construction of its language*. Nor should the rule which requires

> strict construction in certain cases be confused with the definition of the term [at issue].

Id., 166 Md. at 121 (citations omitted; emphasis added).

The SRC's power of eminent domain is derived from the Maryland Constitution and Title 8 of the Transportation Article. Article III, § 40B of the Maryland Constitution provides:

> The General Assembly shall enact no law authorizing private property to be taken for public use without just compensation, to be agreed upon between the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation, *except where such property in the judgment of the State Roads Commission is needed by the State for highway purposes, the General Assembly may provide that such property may be taken immediately* upon payment therefor to the owner or owners thereof by said State Roads Commission, or into Court, such amount as said State Roads Commission shall estimate to be of the fair value of said property, provided such legislation also requires payment of any further sum that may subsequently be awarded.

(Italics added).

Subtitle 8, Section 3 of the Transportation Article, which governs the "[a]cquisition and [d]isposition of Property," authorizes the SRC to institute condemnation

proceedings. Part I, "Definitions; General Provisions," and Part II, "Purposes for Which

[30]

Property May be Acquired," are of particular relevance to this appeal. Tr. § 8-302 provides, in pertinent part:

> **General power to acquire private property**
>
> * * * *
>
> (b) *Condemnation by the Commission.* -- On behalf of and at the request of the [MSHA], the State Roads Commission may exercise the authority vested in it by Article III, § 40B of the State Constitution and acquire for this State, by condemnation under Part III or Part IV of this subtitle, for *any highway purpose.*

(Italics and boldface added).

Tr. § 8-101(p) defines "State highway" as "any public highway owned by the State." The definition of highway, as defined by Tr. §8-101(i), expressly includes "related stormwater management facilities." Tr. § 8-101(i) (Supp. 1995) provides that a

> "[h]ighway" includes:
>
> (1) Rights of way, roadway surfaces, roadway subgrades, shoulders, median dividers, *drainage facilities and structures, related stormwater management facilities and structures roadway* cuts, roadway fills, guardrails, bridges, highway grade separation structures, railroad grade separations, tunnels, overpasses, underpasses, interchanges, entrance

> plazas, approaches and other structures *forming an integral part of a street, road or highway* including bicycle and walking paths.
>
> . . .
>
> (2) Any other property acquired for the construction, operation, or use of the highway.

(Italics added).

Additionally, Tr. § 8-303(b) allows local governments to transfer publicly owned property to the State for highway construction, and Tr. § 8-304 allows counties and the State to transfer between each other "title to, jurisdiction over, or responsibility for maintenance" of roads in Maryland.

Two other provisions are also of significance. Tr. § 8-312 provides,

[31]

> **§8-312. Scope of Part**
>
> (a) *Purposes not exclusive.* -- The purposes of acquisition specified in this part are in addition to any others specified by law.
>
> (b) *Manner of Acquisition.* -- Unless otherwise expressly provided in this part, *property acquired for any purpose specified in this part may be acquired by any of the means authorized by § 8-302 of this subtitle.*

(Boldface in original; italics added).

Tr. § 8-313(a) provides,

> **§ 8-313. Acquisition of land to protect highways.**

> (a) *Purposes of Acquisition.* -- (1) Any land may be acquired under this subtitle for any *State highway construction purpose.*
>
> (2) Any land along or near any State highway may be acquired under this subtitle:
>
> (i) To protect the highway or any scenery along or near it;
>
> (ii) For landscaping the highway;
>
> (iii) To provide parking and service areas along the highway; or
>
> (iv) For any similar purpose.

(Boldface in original; italics added).

Appellee relies on the language of Art III, § 40B of the Maryland Constitution and Tr. §8-313(a) to support its contention that the SRC lacked authority to quick-take appellee's land for the SMP, because it was necessitated by the construction of a *County* road, not a *State* highway, and primarily served private and County interests. In our view, these provisions do not limit the SRC's quick-take authority to highway projects that serve *only* State interests, or that are exclusively State-owned.

As we noted, Article III, § 40B allows the SRC to quick-take private property that is "needed by the State for *any* highway purposes." (Italics added). In our view, the

language, "needed by the State," does not mean that *only the State* may need the property

[32]

or that the State must own or fund the highway project in order to quick-take property necessitated by the highway construction. Rather, it is conceivable that, as in this case, the State and a county would work together on a highway project, with the State designing and constructing the highway and the County providing funding for the project. Indeed, a restrictive interpretation of the SRC's quick-take power would unduly limit the State's ability to work jointly with counties on highway projects. As the SRC maintains, "the joint nature of a project makes it difficult and undesirable to attempt to divide it into parts which are attributable to one jurisdiction or the other. . . . " Similarly, limiting the SRC's quick-take power to State-owned highway projects is inconsistent with Tr. §§ 8-303(b) and 8-303(a), which facilitate joint county-State highways projects.

Moreover, the use of the word "any" evidences an intent not to limit the SRC's power exclusively to projects that benefit solely the *State*. As we have stated, "'[a]bsent a clear indication to the contrary, a statute, if reasonably possible, is to be read so that no word, clause, sentence or

phrase is rendered surplusage, superfluous, meaningless, or nugatory '" *Nationwide Mutual Insur. Co. v. Seitz*, 110 Md. App. 355, 365 (1996) (citing *Management Personnel Services, Inc. v. Sandefur*, 300 Md. 332, 341 (1984); *See also Debusk v. Johns Hopkins*, 342 Md. 432, 445 (1996).

Furthermore, Tr. § 8-313(a) does not constitute an exclusive limitation on the SRC's quick-take authority. Rather, Tr. § 8-302(b) governs the SRC's **"[g]eneral power to acquire private**

[33]

property." (Bold in original). Moreover, Tr. § 8-313(a) applies to general condemnation actions, as well as quick-take actions, and Tr. § 312(b) provides that, "unless otherwise expressly provided" in Subpart II, the provisions in Subpart II do not limit the SRC's quick-take authority, pursuant to Tr. § 8-302.

In sum, we conclude that the SRC possessed statutory authority to quick-take appellee's property for the SMP, because the Maryland Constitution and Title 8 of the Transportation Article afford the SRC the power to quick-take property for "any highway purpose."

B. The quick-take of appellee's property complied with the requirements of the U.S. and Maryland

Constitutions.

Having concluded that the SRC possessed statutory authority to quick-take appellee's property for the SMP, we shall now consider whether the SRC exceeded the bounds of its statutory power, in contravention of the requirements of the U.S. Constitution. In order to meet the constitutional requirements of condemnation proceedings, the taking of appellee's property must be for a "public use" or purpose *and* constitute a "public necessity." *See High Ridge Assoc. Inc. v. County Comm'rs of Carroll County*, 105 Md. App. 423, 432-33, *cert. granted*, 341 Md. 30 (1995). We hold that the SRC's taking of appellee's property was constitutional. We shall explain.

1. The quick-take of appellee's property was for a public purpose.

Appellee argues that condemning its land for the SMP did not constitute a public purpose, because approximately eighty percent of the SMP accommodated runoff from private commercial interests.

[34]

In contrast, the SRC contends that the taking of appellee's property was for a public purpose because, pursuant to Subtitle 4 of the Environmental Article and State regulations,

the SRC was required to manage all of the stormwater runoff that previously flowed into the shopping center's SMP, as well as runoff from the highway construction project along Routes 108 and 124. The SRC also contends that the SMP was for a public use, because it was made necessary by the construction of Route 124, which served a public purpose. We agree with appellant's contentions.

As we stated earlier, pursuant to the U.S. and Maryland Constitutions, private property may only be condemned for a public purpose or use. *See Prince George's County v. Collington Crossroads, Inc.*, 275 Md. 171, 181 (1975). Therefore, governmental entities are prohibited from using their power of eminent domain to benefit solely private interests. *City of Baltimore v. Chertkof*, 293 Md. 32, 42 (1982).

A precise definition of public use has eluded courts for many years. *Collington Crossroads*, 275 Md. at 181; *High Ridge Assoc.* 105 Md. App. at 432. Commentators explain that,

> [n]o general definition of what degree of public good will meet the requirement of a 'public use' for the exercise of the power of eminent domain can be framed, since *in every case it is a question of public policy, the determination of which is dependent upon the*

> *facts and circumstances. The meaning of the term is flexible and is not confined to what may constitute a public use at any given time; the term must be applied in light of what the legislature seeks to accomplish and what it may properly consider to be a public use at the present time.*

29A C.J.S. *supra*, § 29 at 147 (emphasis added). See also *Collington*, 275 Md. at 185 (noting that the concept of public use

[35]

is not static). Nevertheless, guiding principles regarding public use have emerged.

Generally, a public use is one that benefits public as opposed to only private interests. But public use does not require that there be actual physical use by the public. *Chertkof*, 293 Md. at 32; *Collington Crossroads*, 275 Md. at 182; 29A. C.J.S., *supra*, § 29 at 147-48. Nor is it required that the government obtain title to the property that is taken. *Collington*, 275 Md. at 182. Rather, it is sufficient if the use "concerns the whole community or promotes the general interest in its relation to any legitimate object of government." 29A C.J.S., *supra*, § 29 at 148. "[T]hat is, public use means public advantage, convenience, or benefit, and uses that

contribute to the general welfare and the prosperity of the whole community, or a portion of it, constitute public use." 26 Am. Jur.2d, *supra*, § 50 at 494. Moreover, the goals of public health and safety and the management of natural resources within the State are generally legitimate to justify condemnation. *Chertkof*, 293 Md. at 43 (citing *Collington Crossroads*, 275 Md. 171; *Perellis v. City of Baltimore*, 190 Md. 86 (1948); 26 Am. Jur.2d, *supra*, § 52 at 497).[16]

In *Collington Crossroads*, the Court considered whether the construction of an "industrial park" or "employment center to

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[16] While legislative determinations concerning public use are subject to judicial review, *Chertkof*, 293 Md. at 43; *Prince George's County v. Beard*, 266 Md. 83, 95-96 (1972), when a legislature proclaims a use to be public, there is a presumption that the use is, in fact, public. *Anne Arundel County v. Burnopp*, 300 Md. 343, 348 (1984).

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encourage the establishment of private business in Prince George's County constituted a public use. *Id*, 275 Md. at 172. The development of the industrial park was expected to strengthen the economic base of the region by providing employment opportunities and by increasing revenues from property taxes. *Id.*, 275 Md. at 177. The Court upheld the

condemnation of land for the industrial park, stating that "projects reasonably designed to benefit the general public, by significantly enhancing the economic growth of the State or its subdivisions are public uses . . . ." *Id.*, 275 Md. at 191.

Certainly, when the *primary* objective of a taking is to promote private interests, the taking does not serve a public purpose. *Chertkof*, 293 Md. at 43 (citing *Collington Crossroads*, 275 Md. 171; *Perellis v. City of Baltimore*, 190 Md. 86 (1948)). "Conversely, where private use or private benefit resulting from the exercise of eminent domain is merely incidental or secondary to the primary public purpose underlying the taking, the condemnation action is not unlawful." *Id.* (citing *Dobler v. City of Baltimore*, 151 Md. 154 (1926); *City of Baltimore v. Brengle*, 116 Md. 342 (1911)). Furthermore, even if the condemnation is "of especial convenience or advantage to certain individuals . . .," it may still be for a public use. *Anne Arundel County v. Burnopp*, 300 Md. 343, 352 (1984). The public nature of a condemnation is not destroyed solely because private persons will benefit or will own the condemned property. *Chertkof*, 293 Md. at 43.

Moreover, pursuant to "the incident-to-the-taking" doctrine,

the public purpose of a condemnation is not negated if the land that is condemned is taken to compensate private parties whose land was previously taken by the government for a public purpose. See *Burnopp*, 300 Md. at 351-53; *Chertkof*, 293 Md. at 48-52; *Collington* 275 Md. at 182-88; *Pitznogle v. Western Maryland Railroad Company*, 119 Md. 673, 679 (1913); *Substitute Condemnation: Power to Condemn Property or Interest Therein or to Replace other Property Taken for Public Use*, 20 A.L.R.3d 862, 867 (1968). Based on "the incident-to-the-taking" doctrine,

> the second taking is justified as being incident to the first taking as the best, although not necessarily the only, means of satisfying the constitutional requirement of just compensation, regardless of whether the subsequent use of the third person's land benefits the public.

20 A.L.R, *supra*, § 2[a] at 866. Commentators explain that,

> the constitutionality of substitute condemnation as being for a public use has been upheld where the activity on the third person's land, which is taken to compensate the owner of the land required for the public use, is either itself a public use . . . , or where the second taking is justified as being incident to the first taking as the best, although not necessarily the only, means of satisfying the constitutional

> requirement of just compensation, regardless of whether the subsequent use of the third person's land benefits the public, including the relocation of power lines necessary to the relocation of roads, utilities, or housing, and for the purpose of furnishing a means of access to and egress from parcels of private property cut off by a limited access highway.

26 Am. Jur.2d, *supra*, § 95 at 528-29.

For example, in *Pitznogle*, a railroad company that was authorized by statute to condemn land for "railroad purposes" petitioned to condemn Pitznogle's property, in part for the expansion of a railroad line and, in part, to relocate a private

[38]

road that was needed for railroad operations. In challenging the petition, Pitznogle argued, *inter alia*, that the railroad had exceeded its statutory authority, because the substitute road would only serve to benefit private property owners. *Id.*, 119 Md. at 677. The Court, however, rejected Pitznogle's contention, stating:

> The condemnation of a part of his land, here sought to be condemned, for a substitute private road or way is incident to and results from the taking, by reason of public necessity, of the existing private road for public use, and the use of it for such purposes should, we think, be regarded as a public use within the

meaning of the Constitution.

Id., 119 Md. at 679.

It is the exclusive province of the courts to determine whether a specified use is public or private. *Chertkof*, 293 Md. at 43; *Beard, supra*, 266 Md. at 95; *High Ridge Assoc.*, 105 Md. App. at 434. In *High Ridge Assoc.*, we explained that, "'[t]he question whether a use . . . is really public is ultimately a judicial one.'" *Id.*, 105 Md. App. at 435 (quoting Nichols, supra, § 7.16).

In view of the foregoing, we conclude that a public purpose existed for the condemnation of appellee's property. The taking of land to construct ditches or drainage areas to advance the public's health, well-being, and comfort is a legitimate use of the power of eminent domain. 29A C.J.S., *supra*, § 44, at 163. Furthermore, in our view, it is self-evident, based on examination of the Maryland Code and COMAR provisions, that stormwater management serves a public purpose and benefits the public at large. Md. Code Ann. Environ. Art ("Env."), §4-201 provides:

> The General Assembly finds that *the management of stormwater runoff is necessary to reduce stream channel*

> *erosion, pollution, siltation and sedimentation, and local flooding, all of which have adverse impacts on the water and land resources in Maryland.* The General Assembly intends, by enactment of this subtitle, *to reduce as nearly as possible the adverse effects of stormwater runoff and to safeguard life, limb, property and public welfare.*

(Emphasis added).

Additionally, COMAR 26.09.02.01A provides:

> The primary goal of the State and local stormwater management programs *is to maintain after development, as nearly as possible, the pre-development runoff characteristics,* and to reduce stream channel erosion, pollution, siltation and sedimentation and local flooding.

(Emphasis added).

Moreover, based on the "incident-to-the-taking" doctrine, the taking of appellee's land for the SMP was for a public use, because construction along Routes 108 and 124 served a public purpose; this triggered the State's obligation to manage stormwater caused by its road construction. In Maryland, "[t]here can be no dispute of the fact that condemnation of private property for a public highway or road is a proper public use." *Burnopp*, 300 Md. at 350 (citing *Bond v. M. & C. C. of Baltimore*, 116 Md. 693 (1911)). See

also 26 Am. Jur.2d, *supra*, § 72 at 510. Additionally, as we noted, pursuant to Title 8 of the Transportation Article, the SRC is empowered to quick-take land for "stormwater management facilities and structures" related to highway construction. See Tr. §§ 8-101(i)(i) and 8-313. And, pursuant to Tr. § 4-205, since July 1, 1984,

> a State or federal agency may not undertake any land clearing, soil movement, or construction activity involving soil movement unless the agency has submitted
>
> [40]
>
> and obtained approval of a stormwater management plan from the Department [of] the Environment.

Additionally, COMAR 26.09.02.05 provides,

> **.06 When Stormwater Management is Required**
>
> A. After July 1, 1984, unless the particular activity is exempted by this regulation, a person[17] may not develop any land without an approved stormwater management plan from the approving agency. A grading or building permit may not be used for a property unless a stormwater management plan has been approved. . . .

Although we agree with appellee that Cynwood Investments and other commercial properties in downtown Damascus will likely benefit from, and use, the SMP, the public character of the quick-take of appellee's property did

not disappear merely because private entities will benefit from and use the SMP. To hold otherwise, we would need to find that the primary purpose of the SMP was to benefit Cynwood or other private landowners. *See Chertkof*, 293 Md. at 43. We decline to make such a determination. We cannot ignore the State's policy of safeguarding the environment and protecting the public, or that Maryland Code and COMAR provisions require stormwater management. Moreover, as we have stated, the law of eminent domain does not require that there be actual physical use by the public. *Collington Crossroads*, 275 Md. at 182. It is sufficient that the condemnation helps to preserve

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[17] COMAR 26.09.02.02 defines person as,

> the federal government, the State, any county, municipal corporation or other political subdivision of the State, or any of their units, or an individual, receiver, trustee, guardian, executor, administrator, fiduciary, or representative of any kind, or any partnership, firm, association, public or private corporation, or any other entity.

"water and resources in Maryland" and "to safeguard life, limb, property and public welfare." See Env. § 4-201.

2. The SRC's determination as to the public necessity for the SMP must be upheld.

The SRC argues that its decision as to the public necessity of building the SMP on appellee's property is not subject to judicial review, because there is no evidence that the State acted with ill intent in deciding that it was necessary to build the SMP on appellee's property. We agree with the SRC that appellee did not satisfy its burden of establishing bad faith on the part of the State in connection with the SRC's decision as to the public necessity of condemning appellee's property.

After determining whether a public purpose exists for a taking, a court must also resolve whether the governmental authority properly determined that a "public necessity" justified the taking. *High Ridge Community Assoc.* 105 Md. App. at 433; *Rollins Outdoor Advertising, Inc. v. State Roads Comm'n*, 60 Md. App. 195, 201 (1984). Nevertheless, "absolute necessity is not required." *High Ridge Assoc.*, 105 Md. App. at 433. Rather, the use need only be reasonably necessary under the circumstances. *Burnopp*, 300 Md. at 349.

Governmental bodies that are authorized by statute to exercise the power of eminent domain possess broad

discretion to determine the location and amount of land that will be condemned. 26 Am. Jur.2d, *supra*, §§ 30 to 31, at 476-78. Therefore, judicial review of the issue of public necessity is very limited. A governmental determination concerning public necessity is determinative unless

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"'the decision is so oppressive, arbitrary, or unreasonable as to suggest bad faith.'" *Schrodel*, 320 Md. at 216 (quoting *Murphy v. State Roads Comm'n*, 159 Md. 7, 15 (1930)). The landowner has the burden of establishing that the decision was so oppressive, arbitrary, or unreasonable as to indicate the existence of fraud or an abuse of power. *Id.*, 320 Md. at 217.

Based on the 1989 County memorandum, the trial court believed that the County and Cynwood Investments conspired to acquire appellee's property through the State's power of eminent domain. Nevertheless, the court also found that the SRC was not involved in a conspiracy with the County and Cynwood Investments.

In any event, a public use need not be absolutely necessary, but only "reasonably necessary," based on the circumstances. *Burnopp*, 300 Md. App. at 349. Mr. Covington testified that the SRC chose the present site for the SMP,

after careful consideration of several factors, including the location of wetlands and the area of natural drainage. Although only twenty percent of the SMP serves runoff from the Route 108 extension, the SRC was obligated to replace the shopping center's SMP in order to "maintain as nearly as possible, the pre-development runoff characteristics." See COMAR 26.09.02.01A. Therefore, even if the County and Cynwood "conspired," their conduct or motivation does not vitiate the public necessity that justified the State's actions.

II.

Based on the scope of the project rule set forth in *Baylin v. State Roads Comm'n*, 300 Md. 1 (1984), the trial court concluded

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that the construction of the Route 124 extension and the road project must be considered as separate projects for the purpose of valuation and that the value of the Route 124 extension should be considered in determining the fair market value of the taking. The SRC contends, however, that the SMP was an integral part of the construction of Route 124 and, therefore, appraisers may not take into account appellee's proximity to the Route 124 extension in valuing appellee's property.

As we have stated, private property may only be taken

upon payment of just compensation to the property owner. *King v. State Roads Comm'n of the State Highway Administration, supra,* 298 Md. at 83. "Just compensation" means the value of the subject property when it is taken. Nichols, *supra,* § 12.01, at 12-2. In *King,* the Court of Appeals explained that,

> 'just compensation' for the taking of property means the full monetary equivalent of the property taken; the property owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.

Id., 289 Md. at 84. the value of the property is generally determined to be its "fair market value." *See Dodson v. Anne Arundel County,* 294 Md. 490 (1982); *Bonaparte v. Baltimore City,* 131 Md. 80 (1931); Md. Code Ann., Real Prop. Art. ("R.P."0, §§ 12-104 and 12-105 (Supp. 1995); Nichols, *supra,* § 12.01, at 12-8. The value of the property shall be determined on the date of the taking, or if the property had not yet been taken, the date of the trial. R.P. § 12-103.

R.P. § 12-105 defines fair market value as follows:

[44]

> The fair market value of property in a condemnation proceeding is the price as of the valuation date for the highest and best use of the property which a vendor, willing but not

> obligated to sell, would accept for the property, and which a purchaser, willing but not obligated to buy, would pay, excluding any increment in value proximately caused by the public project for which the property condemned is needed. In addition, fair market value includes any amount by which the price reflects a diminution in value occurring between the effective date of legislative authority for acquisition of the property and the date of actual taking if the trier of fact finds that the diminution in value was proximately caused by the public project for which the property condemned is needed, or by announcements or acts of the plaintiff or its officials concerning the public project, and was beyond the reasonable control of the property owner.

When, as in this case, only a portion of the property owner's land is condemned, R.P. § 12-104(b) provides that the damages shall be awarded as follows:

> The damages to be awarded where land, or any part of it, is taken is the fair market value of the part taken, but not less than the actual value of the part taken plus any severance or resulting damages to the remaining land by reason of the taking and of future use by the plaintiff of the part taken. The severance or resulting damages shall be diminished to the extent of value of the special (particular) benefits to the remainder arising from the plaintiff's future use of the part taken.

Maryland courts have construed the measure of damages under R.P. § 12-104(b) as "the difference between the fair market value of the whole property immediately before the taking and the fair market value as to what is left immediately after the taking." *Oxon Hill Recreation Club v. Prince George's County*, 281 Md. 105, 107-08 (1977). See also *Perkins v. State Roads Comm'n*, 55 Md. App. 639, 645 (1983).

The fair market value of the condemned property before the taking occurs "cannot include or take into account any increment in

[45]

value which may be proximately caused by the public project for which the property is being taken." *Baylin*, 300 Md. at 9 (citing *Dodson v. Anne Arundel County*, 294 Md. 490, 495 (1982); *State Roads Comm'n v. Parker*, 275 Md. 651, 683 (1975); *King v. Mayor of Rockville*, 249 Md. 243, 251 (1968)). Nevertheless, "if, after the government became committed to [a] project, the government . . . decided to take [the condemnee's] land as part of a subsequent enlargement, then the condemnee would be due the enhancement value" of the project." See *Baylin*, 300 Md. at 10 (citing *United States v. Miller*, 317 U.S. 369, 377 (1943)). In other words, "if the

land [that is condemned] is expected to be outside the boundaries of the proposed improvement and is in fact outside, then the increase in value of th[e] land taken for another project must be recognized." *Id.*, 300 Md. at 20.

In *United States v. Miller*, 317 U.S. 369, *reh'g denied*, 318 U.S. 798 (1943), the U.S. Supreme Court set forth the "scope of the project" rule, which is used to determine whether a property's proximity to a public project should be a factor in assessing the fair market value of the land. The Court said:

> If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken anymore than the owner of the first tract condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in

value due to the projected improvement.

> *The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known facts that the lands probably would be condemned.*

Id., 317 U.S. at 376-77 (emphasis added).

In *United States v. Reynolds*, 397 U.S. 14 (1970), the United States asked the Supreme Court to "'clarify'" the scope of the project rule, but the Court stated that the test "was stated with admirable clarity by [the] Court in *Miller*." *Id.*, 397 U.S. at 21. The Court added, however, that,

> [a]s with any test that deals in probabilities, its application to any particular set of facts requires discriminating judgment. *The rule does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the course of the planning or original construction it became evident that land so situated would probably be needed for public use.*

Id. Additionally, the Court noted that, although it is the role of the jury to determine "just compensation" in a condemnation case, the question of whether the taking of land in issue was within the scope of the original project is a legal question to be decided by the trial court. *Reynolds*, 397 U.S. at 20 n.14.

Based on the "*Miller* rule," courts have constructed a three-part test to determine whether the owner of the property that is condemned is entitled to enhanced value: (1) the foreseeability that the project would include condemnee's property on date of commitment; (2) the length of time between the date of commitment and condemnation of the property; and (3) government representations regarding the finality of the project as announced on the date of commitment. *Baylin*, 300 Md. at 16-19.

The three part test is premised upon equitable principles and the reasonable expectations of the property owner at the date of commitment to the project. *See Baylin*, 300 Md. App. at 19-20. In *Baylin*, the Court explained that,

> '[w]hether or not the increment in value is attributable more to the Government's special demand for the property or more to a private market demand for benefits conferred

> upon the property by its proximity to the Government project is largely a function of reasonable expectations. *The crucial inquiry is whether, after commencement of project A but piror to the condemnation of property x, the owner or a private purchaser contemplated acquisition and development of property x could reasonably anticipate that he would be able to devote that property to its highest economic use, enjoying the advantages inherent in its proximity to the nearby Government project, without serious apprehension that the property x would soon be condemned.'*

Id., 300 Md. at 19-20 (quoting *320 Acres*, 605 F.2d 762, 793 (5th Cir. 1979) (emphasis added). Moreover, in *320 Acres of Land*, the court stated:

> Regardless of how the inquiry is framed, . . . the object of [the scope of the project test] is the same: to distinguish value attributable to Government demand from true fair market value of Government conferred benefits, and to ensure that the landowner is not awarded a premium for the former but, at the same time, is justly compensated for the latter.

Id., 605 F.2d at 793.

The Court of Appeal's application of the scope of the project test in *Baylin, supra*, is particularly instructive. There, in 1948, at Baltimore County's request, the SRC created a plan for the building of a "limited access highway" in the area between Liberty

Road and Reisterstown Road. In 1952, the project, which was later renamed the Northwest Expressway, was budgeted as of July 1, 1954 in the SRC's twelve year road construction and reconstruction program. In 1957, the SRC approved design plans for the highway, including the location of the centerline and the median. Additionally, during the 1950's and 1960's, construction drawings, ground surveys, and right-of-way plats were created. The construction drawings showed that the highway would run through the property owner's future plot of land ("the Owners"), thereby requiring a taking of 19.32 acres from the entire tract. In 1960, the SRC approved the location of the expressway. In 1963, Baylin's predecessor in title received a plat showing the proposed right of way, but indicating that the plans were "TENTATIVE AND SUBJECT TO REVISION." *Id.*, 300 Md. at 5.

In 1965, the federal government completed a study concerning construction of the Northwest Rapid Transit Line, which proposed that a transit line be located in the median of the proposed Northwest Expressway. Studies published in 1968 and 1970 echoed approval for that suggestion.

The Owners purchased the property in issue in 1965. In 1967, an engineer hired by the Owners obtained copies of the State's preliminary construction plans for the Northwest Expressway, which showed the same project location through the Owners' property. At the time, the State told the engineers that the plans were "very tentative" and that the Northwest Expressway was "'under restudy and subject to change based on traffic needs, [and] latest design

criteria . . . ." *Id., 300 Md. at 5.*

Subsequently, because funds for the highway were transferred to another highway project, construction of the Northwest Expressway was delayed. Before funds were reallocated toward the project, many occurrences affected its construction. In 1969, the National Environmental Policy Act went into effect, and new safety standards for highways were also enacted. In addition, the Mass Transit Authority was established and tentative plans began for a project involving the joint construction of the Expressway and a "Mass transit

facility," that was proposed for placement in the median of the Northwest Expressway. In 1972, the rapid transit project was shown in the Consolidated Transportation Program. At a public hearing in 1973, the original plan for the Northwest Expressway, as well as an alternate route, which would have required about 60 acres of Baylin's property, were presented. The final plan, as adopted by the State in 1976 and as accepted by the federal government in 1977, proposed that a new road, Owings Mills Boulevard, be built through the Owners' property and that a large rapid transit facility and parking lot be located on the property.

As a result, in 1981, the State filed a condemnation proceeding against approximately 137 acres of the Owners' land, in order to build the Northwest Expressway and the Mass Transit Facilities. The Owners argued that all of the land, except 19 acres, should be enhanced in value by the land's proximity to the Northwest Expressway, because only 19 acres of the property were included in the project when the State originally committed to

building the Northwest Expressway. Nonetheless, the trial court determined that, since the State committed to building the project in 1954, there was "one ongoing project." The trial court thus ruled that expert testimony could not take into

account any enhancement to the property value due to its proximity to the Northwest Expressway. *Id.*, 300 Md. at 8. The Court reversed, however, finding that the Expressway and the Mass Transit Facility were distinct projects for the purpose of valuation and determining damages from the taking. *Id.*, 300 Md. at 8.

In applying the scope of the project test, the Court noted that the date of commitment to the Northwest Project was in 1954, when the project was announced and funds were allocated for it. What the Court said is pertinent here:

> The record in this case indicates that the Northwest Expressway was initially considered in 1948. The project was announced to the public and funds were budgeted for it in 1954. Construction plans and right-of-way plats were initiated and some property was acquired for the Expressway. In 1957 the centerline of the highway was established. From the time the project was announced people were aware of the general path of the highway; there was a reasonable expectation that part of appellants' land would be taken for the Expressway. At this time landowners and prospective purchasers could not expect to devote part of these properties to their highest and best use. However, this announcement did create a new market for the remaining and neighboring land. . . .
>
> In view of the above, we cannot say that the finding of the trial judge that the state

> was committed to the project in 1954 was clearly erroneous.

Baylin, 300 Md. at 14.

The Court concluded that it was not foreseeable in 1954 that the "original proposed dimensions" of the project might need to be changed to include the condemned property. The Court reasoned

that,

> [a]t the time and for at least the next 11 years [after commitment to the project], no one contemplated building a Mass Transit Project. Even the most 'astute and informed' landowner, could not have foreseen that property surrounding the Northwest Expressway 'would probably be incorporated' for the Transit facility.

Id., 300 Md. at 17 (citations omitted).

The Court then pointed out that the length of time between commitment and the "possibility" of the Mass Transit System was 27 years. *Id.*, 300 Md. at 17. The Court remarked that this period left ample time for the market value of the property to increase in light of the property's location next to the Expressway. *Id.*, 300 Md. at 18. The Court noted, however, that landowners have been allowed to recover enhanced value "where the lapse of time is much shorter." *Id.*

In considering government representations concerning the plans for the project as originally announced, the Court determined that even though the government indicated that the Expressway plans were tentative, a reasonable landowner or purchaser of property could not have foreseen that a rapid transit facility would be added to the plan and built on the Owners's land. *Id.*, 300 Md. at 18-19. The Court further remarked that equitable considerations favored allowing the Owners to recover enhanced value. It said:

> [The Owners] bought the property in expectation that the Expressway would be built. They paid an increased price for this property because its value was based on proximity to the proposed Expressway; they wanted to develop the property to its highest and best use. But, did they gamble that the state would then take this property, for a project no one was aware of, and pay for its pre-Northwest Expressway value. Appellant would have made a bad business decision if the state decided not to

> build the original road -- as we see it -- that was the extent of this gamble.

Id., 300 Md. at 21.

Applying these principles here, we are of the view that the trial court erred in holding that the date of commitment

was in May 1971, when Montgomery County amended its Master Plan. Master plans serve as general guides that "recommen[d] area development and propos[e] future land use and zoning." *Boyds Civic Ass'n v. Montgomery County Council*, 67 Md. App. 131 (1986), *aff'd in part, rev'd in part on other grounds*, 306 Md. 683 (1987). *See also People's Counsel for Baltimore County v. Webster*, 65 Md. App. 694, *cert. denied*, 306 Md. 70 (1986). We have said that "a Master Plan is at best a 'flexible guide,' or an 'intellectual prophecy' of future development. *Kanfer v. Montgomery County Council*, 35 Md. App. 715, 733 (1977). Advisory in nature, master plans "are continually subject to modification in light of actual land use development and serve as a guide rather than a straightjacket." *Boyds*, 67 Md. App. at 143. As the SRC contents, "[a]bstract, long range planning of the sort done in the master plan cannot qualify as the practical, detailed design necessary to constitute a commitment to a project under the scope of the project rule."

Furthermore, as we observed earlier, the Court in *Baylin* held that, although the Northwest Expressway first appeared in the SRC's 1948 plan, the date of commitment was not until July 1, 1954, when Baltimore County announced the project and allocated funds for it.

See Baylin, 300 Md. at 17. The Court explained that,

> [i]n some instances the commitment date may be the date
>
> -53-
>
> the government announced the project. However, if there is a considerable length of time between the announcement and the taking this may mitigate against using such a date. Under those circumstances the date of commitment [is] defined as,
>
> > the date as of which the landowners or prospective purchasers no longer could reasonably anticipate being able to devote these properties to their highest and best use in the context of the surrounding governmental project, without serious apprehension that the property would soon be condemned. In other words, it is *the date as of which the prospect of imminent condemnation becomes sufficiently definite that it should be a major factor in the decision of any reasonable person to buy or develop property.*

Id., 300 Md. at 13 (citing *United States v. 320 Acres of Land*, 605 F.2d 762, 805 (5th Cir. 1979)) (emphasis added). *See*

also Washington Metropolitan Area Transit Authority v. Five Parcels of Land in Prince George's County, 473 F.Supp. 1232, 1234, 1237 (D.Md. 1979) (although the project had been planned since the 1960's, the date of commitment for the project was in 1971 when maps and drawings of the project were presented at a public hearing).

In view of the foregoing, it appears that, in this case, the date of commitment may have been in 1987, when the funds were allocated for the project through amendment to the MOU, or in 1988, when the State presented its preliminary plans and drawings to extend Route 124 some 500 feet during the public hearing, or in 1990, when the State presented its final plans of the Route 124 extension. On remand, the trial court should determine, based on *Baylin*, the date upon which "landowners and prospective purchasers no longer could reasonably anticipate being able to devote [their] properties to their highest and best use in the context of the

surrounding governmental project." *Baylin*, 300 Md. at 14 (quoting *320 Acres of Land*, 605 F.2d at 807). After the court determines the date of commitment, the court should then apply the scope of the project test as enunciated in *Baylin*. If the court finds that it was not reasonably foreseeable that

appellee's land would be condemned for an SMP on the commitment date, the value of appellee's property may be enhanced as a result of its proximity to the Route 124 extension.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

COSTS TO BE PAID TWO-THIRDS BY APPELLEE AND ONE-THIRD BY APPELLANT.

APPENDIX C

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY

STATE ROADS COMMISSION OF THE STATE HIGHWAY ADMINISTRATION Acting for and on behalf of the STATE OF MARYLAND	:	
Plaintiff	:	
v.	:	Civil No. 93,313
WJM REALTY, INC., et al.	:	
Defendants	:	

MEMORANDUM OPINION AND ORDER OF COURT

Memorandum Opinion

Plaintiff State Roads Commission of the State Highway Administration seeks to condemn land of one private owner to serve developmental purposes of another private owner. This is an impermissible use of the public power of eminent domain. Moreover, land taking (quick take) for regional storm drainage is beyond commission authority.

Evidence, including testimony, topographical maps and other exhibits, discloses serious traffic and drainage problems assumed by Cynwyd Investments in building its Damascus Shopping Center (Centre). Plaintiff solved Cynwyd's traffic

problem by its long planned design and subsequent construction of road improvements to Maryland Route 108 and the intersection of Maryland Routes 108 and 124 and by a stub extension of Route 124.

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To solve its drainage problems, Cynwyd, with assistance from Montgomery County, Maryland, sought a regional storm drainage facility on land owned by Defendant WJM Realty, Inc. (William J. Miller). Because the facility would have disastrous consequences to developmental usage of defendant's frontage on the newly constructed stub, defendant "refused the use of his parcel".

As designed and contemplated by plaintiff, the road improvements would utilize land taken from Cynwyd and one other source for two storm water management facilities to satisfy drainage requirements of the road project. Prompted by Cynwyd, Montgomery County proposed to plaintiff that Cynwyd's land not be taken but that defendant's site be acquired "over objection of the owner" "to provide retention serving a larger area" including Cynwyd's shopping center.[1] Plaintiff seeks here to do so.

Defendant presses the pending motion to dismiss these condemnation proceedings. For the reasons stated in open court on March 24 [14], 1995, and on May 25, 1995, this

court concludes the motion should be granted because the acquisition here constitutes an illegal and unauthorized usage of the public power of eminent domain.

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[1]Defendant's Exhibit #5, memorandum dated March 21, 1989 of Marian Hershenson, is one piece of evidence in a voluminous record. As it shows the Factual scenario here presented, it is footnoted and attached hereto. Particular attention is directed to its footnote.

Order of Court

For the reasons stated, it is this 29th day of August, 1995, by the Circuit Court for Montgomery County, Maryland,

ORDERED that:

1. Defendant's Motion to Dismiss is GRANTED; and

2. Proceedings herein are DISMISSED; and

3. FINAL JUDGMENT is entered for Defendant WJM Realty, Inc., costs to be determined.

/s/ James S. McAuliffe, Jr.
James S. McAuliffe, Jr.

Specially Assigned Judge
of the Circuit Court
for Montgomery County, Maryland

MEMORANDUM

March 21, 1989

TO: Steven Poteat
Director, Upper Montgomery County Service Center

FROM: Marian Hershenson
Senior Planning Specialist
Division of Commercial Revitalization
Department of Housing & Community Development

SUBJECT: Need for alternative locations for storm water management facilities for the Maryland State Highway Administration (MHSA) design for improvements to MD Route 108 between MD Route 27 and 124, the intersection of MD Route 108/124, and the 600 foot stub of MD Route 124 Extended.

DHCD has learned that MSHA proposes two storm water management (SWM) facilities to serve the above-referenced road improvements in the Damascus Commercial Area. One would be located on parcel P788, the "old library site," southeast corner of MD Route 108/124. The other would be on parcels N683/N575, the Damascus Shopping Centre property near its Main Street frontage. An objective of the Damascus Revitalization Program is infill commercial development on the shopping center's Main Street frontage or, at the very least, parking to serve Main Street. The owner of

the center, Cynwyd Investments, is in accord with the objective of infill development and has retained an architect to develop a retail design proposal.

DHCD has indicated to MSHA that the proposed SWM facility locations are not optimal. MSHA has stated it has directed its consultant to see if there are other suitable locations.

In the meantime, DHCD is also seeking recommendations for SWM facility locations which do not conflict with revitalization aims. Time is of the essence in order not to delay MSHA's design schedule. DHCD requests that under the auspices of the Upper Montgomery County Service Center, a meeting of other agencies and parties with an interest in SWM in the area, be convened to explore alternative locations.

Possibilities are that SWM plans prepared by Dewberry and Davis for Cynwyd* and/or plans that DOT will be designing for the remainder of MD Route 124 Extended could incorporate MSHA needs.

cc: Richard J. Ferrara
David Chikvashvili
Robert C. Merryman
Greg Leck
Jean Chait
Gloria Kratz
Richard Brush
Larry White
John Hench
Marilyn Clemens
Michael Snyder

Randy Paugh

MH/anm
SPOTEETM

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*Approximately two years ago, plans were prepared for Cynwyd for an off-site SWM facility to the east of their site on a parcel owned by WJM Realty Inc. The County was interested in participating in this facility to provide retention serving a larger area. Cynwyd submitted drawings and calculations to DEP. However, the owner of the proposed site, William J. Miller, ultimately refused the use of his parcel. Should this site be suitable for MSHA needs, we need to know what tools can be used realistically to acquire the site, over the objections of the owner.

IN THE CIRCUIT COURT FOR

MONTGOMERY COUNTY, MARYLAND

STATE ROADS COMMISSION AKAS: MARYLAND STATE,	:
Plaintiff,	:
v.	: Civil No. 93313
WJM REALTY, INC., GRANT S. HESTON, JEAN DULIN HESTON, LAWRENCE A. SHULMAN, DAVID A. PORDY, WASHINGTON SUBURBAN SANITARY COMM., MONTGOMERY COUNTY, MARYLAND	:
Defendants.	:

HEARING

Rockville, Maryland March 14, 1995

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

STATE ROADS COMMISSION AKAS: MARYLAND STATE,	:	
Plaintiff	:	
v.	:	Civil No. 93313
WJM REALTY, INC., GRANT S. HESTON, JEAN DULIN HESTON, LAWRENCE A. SHULMAN, DAVID A. PORDY, WASHINGTON SUBURBAN SANITARY COMM MONTGOMERY COUNTY MARYLAND	:	
Defendants.	:	

Rockville, Maryland
March 14, 1995

WHEREUPON, proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE JAMES S. McAULIFFE, Judge

APPEARANCES:

FOR THE PLAINTIFF:

FRANK W. WILSON, ESQ.
MVA Building
15 Metropolitan Grove Road
Gaithersburg, Maryland 20878

FOR THE DEFENDANTS:

R. EDWIN BROWN, ESQ.
260 East Jefferson Street
Rockville, Maryland 20850

FOR MONTGOMERY COUNTY:

CHRISTOPHER E. HITCHENS, ESQ.
A. KATHERINE HART, ESQ.
101 Monroe Street
Third Floor
Rockville, Maryland 20850

* * * *

Montgomery County's motion to dismiss the third-party claim at tab number 99 is granted without leave to amend. There are several reasons given by Montgomery County for their argument.

I have concluded, however, that the reason I wish to give for the decision in this case is that in a condemnation

case it is not appropriate to have third-party claims of this nature.

If one perceives that one has a claim that grows out of the condemnation proceeding, the proceeding itself and the rules governing condemnation matters do not envision bringing third-party claims. If there are grievances against a third party, they obviously must be the subject of a separate action.

Montgomery County has gone into the merits of the matter and has sought to have some decision on that. For reasons which I will probably make obvious to you later in the day, I am not going to rule on that at this time one way or the other. Besides which, judges soon learn not to rule on anything more than they have to.

With that, the motion is granted without leave to amend on the procedural ground.

All right. Thank you very much.

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* * * *

The property owners in Damascus, the largest property owner by far affected here is Sinwood, have had a problem with drainage control. You have furnished me topography

maps. I have studied them. I am personally familiar, and have been all my life, with the Damascus area.

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* * * *

Amendment Number One says absolutely nothing about storm water management. We are committed in '85, we are definitely committed in '87, we are going forward. These are public records that are being exchanged, available to the public if they want to pursue their rights, because these are public agencies doing the public's work. So they are available. There are no personnel items here, and the public may review them and check them and so forth. And they are there.

And much of it is made to document what is happening so that the public and all other interested parties may know. And again in '87 there is no mention of any storm water management.

In '91 there is Amendment Number Two. And '91 is shortly before construction begins, which I believe was around '92. Because at '91 the parties with copies to the whole world that is involved in this in Amendment Number Two, we see what has happened between '87 and '91. While it has not been spelled out in '85 and '87, we are learning

from those documents and other collateral documents that are in evidence the nature of this roadway that is to be built.

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* * * *

First, the storm drainage area served is more than four times as great as that that was needed for the State Roads project, more than four times as great. And that is true even after you figure that the extra 500 feet is going to require you to eliminate what has been serving in the meantime as a sort of a natural pond, small natural pond, for the accumulation of drainage.

And when you eliminate that in the construction of the extra 500 feet you are going to have to do something about that. But it doesn't mean that you set up what is appropriately called in the deposition of Mr. Merriman -- in this part of the case about the only refreshing thing about what was done here from the Court's

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standpoint was to see the refreshing way in which Mr. Merriman testified.

He has no difficulty, no matter what you want to call it, he has no difficulty in calling it a regional facility. Now, it doesn't matter, ladies and gentlemen, what you call it. We do not deal in nomenclature. We are not concerned with

whether you call it a storm water management pond or a regional drainage facility. We are concerned with how big it is, what does it serve and what does it do and who does it serve. That is what we are concerned with. The nomenclature is not the issue.

But the county's Mr. Merriman says, when presented with the facts and over objection: it sure looks like a regional facility to me. And that was refreshing. And I have to tell you, it sure looks like a regional facility to this judge.

Without reference to the memorandum which bears more on whether we are going to dismiss this condemnation case or not, or at least the whole part of it which relates to the storm drainage as being impermissible, apart from that the project itself, and perhaps that part of the memorandum which is consistent by the testimony given by the State Roads Commission and some of the questions I asked in the testimony.

The Department of Housing and Commercial Development has

learned that Maryland State Highway Administration proposes two storm water management facilities to serve the above-referenced road improvements in the Damascus commercial area. In 1989 the plans of the State Roads Commission was

to provide for storm drainage as for a period now of 12 years or more the state has been required to provide whenever it does a project. That also is in evidence. And they have provided that as they must.

Did they provide for what we see here? Absolutely not. What was on their plans, what is sometimes referred to in a number of documents as preliminary investigative plans and the like, for two storm water drainage facilities; one in the old library that I have referenced, on the old library property just down 124.

Down is important because the drainage there would be pretty easy, and to borrow Mr. Brown's nomenclature, you're not going to buck the grade when you're going down to a pond.

The others would be on parcels N-683 and N-575. Don't both to look at your parcels, I'll tell you where it is. Roughly in either this area or this area going up to Main Street, that is the first parcel mentioned. The other parcel is the large parcel upon which the whole shopping center is built. A small part of that is linked on. That is where the other storm drain was to be, on Sinwood's

property. And it was going to use some of the otherwise usable developable property for which Sinwood had plans.

When you read the last sentence of that paragraph, you have to ask yourself: who is this planning specialist carrying water for. Or the last couple of sentences. In speakese the word "infill" is used. Translated it means: we want to develop that property and use it commercially, an objective of the Damascus Revitalization Program. And I ask you, do you think the objective was greater in the Damascus Revitalization Program or greater in Sinwood.

Is infill commercial development on the shopping center's Main Street frontage, or at the very least parking to serve Main Street? The owner of the center, Sinwood Investments, is in accord with the objectives of infill development. Apparently not so much interested in parking to serve Main Street, but definitely interested in infill development. And has retained an architect to develop a retail design proposal.

In short, ladies and gentlemen, the state had its facility ready and had the preliminary plans, and we know where the two storm water ponds were to go. And we are now learning in '89 what caused the switch. And we are now learning that the state's argument that what was done here was to serve the drainage area involved in the state's project -- I can't help it, Mr. Wilson, it

won't hold water. That is what we are talking about, water, and it won't hold water. That is not what it was all about; not at all, not for a second.

Without the remainder of the memorandum but confirming that fact which is confirmable on all the preliminary plans and other documents as to what the state had projected at that point, this was the turning point and it had absolutely nothing to do with the state's project. And to the slight extent that interfering with that small pond might require some additional consideration, in no way, in no way whatsoever could it even begin to approach what was built there. Not even worth mentioning.

Therefore if we stop there, we reach an answer to an issue that you have posed for me, and it is not a close issue but it requires description and to tell you how you got where you are and what happened.

The so-called storm water drainage project is at the very least a separate project totally and completely from the state project. The overwhelming evidence is that whatever interest it served for the state were incidental to the greater interest being served, and it was an alternate plan that served the state as well or better.

For purposes of valuation and condemnation, therefore, that enormous structure is a separate project totally.

The condemnation for that project must be based upon valuing it as though the road

were there, and severance damage is appropriate including diminution of the loss of value, or the difference between the value before that drainage facility was built and the value after it was built of the land that was condemned to build it.

And since it has effectively -- from a developer's standpoint it has not only taken most of the frontage, which indeed it has, but from a development standpoint it has left the developer with less than nothing in terms of frontage because it has created a major eyesore from a development standpoint which presumably would be in the view of anyone who would purchase what ultimately is developed there.

So it is from their standpoint a monstrosity as to size, as to frontage and as to the ultimate view should they try to develop it. That adds up to damage, lots of damage.

It is the rule of this Court henceforth that all appraisers, all appraisers appraising this property shall view this as two projects and shall take into consideration in appraising the condemnation of the so-called storm water drainage facility, more appropriately a reasonable [regional] storm management facility, they will take into consideration and treat it as two separate projects and will treat the damage

historically as though the road were there when the condemnation took place, which is the appropriate way.

The road has been programmed for over 20 years. The storm

water drainage facility, or reasonable [regional] facility, was a facility that was not the creation of -- it was the physical creation of the State Highway Administration, it was not -- Highway Administration was not the driving force behind this.

Plaintiff's motion in limine at tab 63 is granted and the valuation is stated for the property but not as requested. What this requested was to take up preliminarily as was appropriate what the valuation is and to fix it as a matter of law. I have just done that. I have fixed the standard that will be applied.

And the taking will be as though the road were there and the consequential damage to the remaining property will be as though the road were there since it had been in the Master Plan for 20 years and since the parties here had relied upon it as it shows on the land records for many years and it contracted on that basis, all as shown by the easement. Likewise, the defendant's cross-motion for ruling on separate question of law. I believe -- that very issue.

Well, I have declined to rule on two and three. I do rule on one, and I do rule that the storm water management pond so-called condemnation is a separate project from the State Roads Commission's Route 108 reconstruction project and the County's Route 124 extension. I do so rule.

This material all relates to what the Supreme Court of the

United States has done in the last five years, and particularly the last six months, in the area of imminent domain. And it is very clear that the Supreme Court and the justices there are concerned about the use of imminent domain in improper ways, including the threat to secure land without paying for it on the one hand as well as actually utilizing the power. The power is there but it is constitutionally protected.

My problem with a motion to dismiss is I don't know what you do to put the cat back in the hat after the cat is out. Do you understand me? Now, if you ever looked for a smoking gun, and I missed it the first time through, you look at the footnote. And if you ever want to see a smoking gun in a case, you have found it.

And this tells you why the veer, why the turn, the change and what drove it. And it does not take a -- I think the common lexicon is a rocket scientist, but it does not take

a brilliant intellectual to understand that something was driving the county division here and department.

Now, when you get through with the speakese, I'll translate what it says so there will be no mistake about it. But I think you know what it says. So listen to it because if this case goes on and you can't resolve it, you are going to hear this perhaps even in the Supreme Court of the United States, because this is just the

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sort of thing that they are on track to handle today. Therefore, it is likely to get their nod.

So listen. You will hear it again. Quote, approximately two years ago plans were prepared for Sinwood -- Sinwood. I doubt that Sinwood could write this any clearer or more self-serving than this representative of the county has done it for them. For them.

Approximately two years ago plans were prepared for Sinwood for an offsite storm water management facility to the east of their site on a parcel owned by WJM Realty, Inc. The county was interested in participating in this facility to provide retention serving a larger area. Sinwood submitting drawings and calculations to -- and I assume that this is Department of Environmental Protection, DEP -- however, the

owner of the proposed site, William J. Miller, ultimately refused the use of his parcel.

Parenthetically I say imagine a private owner who didn't want to see his parcel used for this purpose. He didn't want to contract with them. He didn't want to sell this property. It was his property, he had uses for it. He had contracts, he had commitments. He didn't want to dispose of it to them. He wasn't interested. He heard them out, he wasn't interested.

That is what landowning is all about. That is what the

Constitutional protection is all about. Let's not forget the Constitution. It appears in both Constitutions for which these two flags behind me stand, you know, and it is called power of imminent domain and limitations thereon. And that is why the Supreme Court is so interested at this point.

And here is the kicker. Should this site be suitable for Maryland State Highway Administration needs, we need to know what tools can be used realistically to acquire the site over the objections of the owner.

All right. Let's take it out of the speakese. Can we somehow link this up with the State Roads Commission project, hinge it on so we can use the only quick take power of imminent domain that is available anywhere around for the

purpose of extracting from the Millers their property over their vehement objection and taking it by force to use for the benefit of Sinwood. And that is what was done.

And this tells us everything we need to know. There are other documents, but this tells us and it tells us dramatically. The state was an innocent party, interested in getting a road for nothing. The county and the department was carrying water for Sinwood. And largely on behalf of Sinwood, because Sinwood couldn't get it privately over the bargaining table, undertook to get it from them so that the enormous problem that I previously referred

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to on storm drainage which Sinwood has, or had, until this project so conveniently solved it for them, the plans which they drew up privately two years earlier but couldn't sell to the Millers any part of, and the Millers turned them down flat on the bargaining table, which was their absolute right.

So Sinwood -- I don't know whether any of the names on here are Sinwood. But I'll bet you this, I'll bet you Sinwood got copies of this, whether they are copied or not.

You know how I am going to rule if I have to rule on the motion to dismiss, and then I am going to let you take it up and argue it to all the Courts that see fit to let you argue. And I don't think your chances of establishing that this is a

Constitutional use of the power of imminent domain are very good.

I think this is one of the worst travesties. The difference is that the travesty is so well documented. The lawyers can assess their chances. But the problem is the thing is built.

I am not going to rule today because I am afraid that once I do rule the cat will be even harder to handle. But I think you know what I am going to rule. You know, I am here for a reason. I told you before, the judges that sit in these cases are the only protection the landowner has against this very powerful right of

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imminent domain. And these flags are behind here to remind not just you but me about why we are here and why I am here.

And I doubt very much when I issue my ruling, if I have to, that I am going to let the power of imminent domain be used to get what couldn't be gotten -- to get for a private party what could not be gotten across the bargaining table.

And in the lexicon of Constitutional law, that is a no-no. It is one of the few major restrictions, but it is there. Thou shall not do that. With respect to the state, since I believe the state got a copy of this, the state was innocent

party and it was getting something largely for nothing. The state is largely innocent for that reason. But its representatives should have looked more closely at what was happening.

And I hope that in the future when the state is asked to go into something like this, they will. And if they find anything that smells as bad as this does, they will say: our power is not to be used for that purpose. It is spelled out, and it is not to be used for that purpose. And you will not call upon us to carry your water for a private individual who can't get it over the bargaining table after trying for two years on plans they drew up.

For the county it is much worse. Much, much worse. And I don't

know where these people are now, but if I have to make a ruling, I think it is going to hurt a lot of people. We have a new County Executive and a new County Attorney, and if I have to publicly say and document what is right here, what is clear and what happened, it is going to hurt a lot of people and it isn't going to benefit the Miller interest at all. It just isn't. They are not in it for the hurt they can do to people, they are in it to get well. And they deserve to get well.

Now, I don't care what your schedules are, you will either be here at 10:00 o'clock on the 30th of March or you

will send a representative at 10:00 a.m. If you have not -- I will not sit on this case, but the 30th of March will tell you whether you and the Miller interest can come to an agreement that will right a serious Constitutional wrong.

Therefore, the issue of the motion to dismiss is held in abeyance and the decision thereon is held in abeyance until the 30th of March.

Does that turn out to be a Thursday according to your calendars? I think so, but it doesn't matter. Ninety-five percent of what I do now is contested custody. And I just had a case settle, so I have that lone opening. And I am putting it in there for you.

If you come back and tell me that you cannot resolve this

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matter, I am going to do what I have to do, what these flags say I shall do, and then I am going to let you try to put the cat back in the bag.

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* * * *

We aren't talking condemnation now, we are talking Constitutional right and damages for invading basic Constitutional protections and corrupting the process to use the power of imminent domain for a private purpose wholly

wrong when that private entity could not get what they were seeking at the bargaining table. It was done. They got it.

This should not ever be the subject of further suits. This should simply be a resolution of a matter through settlement and payment of just compensation, not only for land but for a serious Constitutional harm.

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* * * *

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

STATE ROADS COMMISSION AKAS: MARYLAND STATE,	
Plaintiff,	
v.	: Civil No. 93313
WJM REALTY, INC., ET AL	
Defendant	

HEARING

Rockville, Maryland May 25, 1995

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

STATE ROADS COMMISSION AKAS: MARYLAND STATE, Plaintiff, v. WJM REALTY, INC., ET AL Defendant	:	Civil No. 93313

Rockville, Maryland
May 25, 1995

WHEREUPON, proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE JAMES S. McAULIFFE, Judge

APPEARANCES:

FOR THE PLAINTIFF:

FRANK W. WILSON, ESQ.
MVA Building
15 Metropolitan Grove Road
Gaithersburg, Maryland 20878

FOR THE DEFENDANTS:

R. EDWIN BROWN, ESQ.
260 East Jefferson Street
Rockville, Maryland 20850

THE COURT: Gentlemen, I adhere to the ruling that the scope of the project rule requires that these projects be considered as two separate projects; the road being first in time and the stormwater maintenance facility be considered as a second project, coming second in time to the roadway, with all of the consequences that will flow therefrom. I so rule.

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* * * *

THE COURT: All right. The second issue, of course, is the basic motion to dismiss. I remain of the view, based upon the evidence that we heard, that this project undertaken by the State so exceeded the State's authority to condemn for

drainage required by its road project, and only that required by its road project, that the power was exceeded to such an extent that it cannot be said that it was appropriately used or legally used, and I conclude that the motion to dismiss on the grounds that it was not used for a purpose of public necessity within the purview of the State Highway Administration's authority to condemn -- it may have been -- within the authority of others, but the Highway Administration may not lend out its eminent domain powers to be exercised by others who have eminent domain powers --

This is not a power to be kicked around or to be traded back and forth. If you have the power, you exercise it. The State has the power in connection with roads, the State Highway Administration; this stormwater drainage facility was a facility to serve much, much more than the roads themselves and was ultimately built, I am convinced, exactly as it was suggested in the footnote to the memorandum which appeared in the original record as defendant's number 5.

* * * *

APPENDIX D

PERTINENT UNITED STATES CONSTITUTION ARTICLES

- Amendment V. "[N]or shall private property be taken for public use, without just compensation."
- Amendment V. "No person shall ... be deprived of life, liberty, or property, without due process of law."
- Amendment XIV. Section 1. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

PERTINENT MARYLAND CONSTITUTION ARTICLES

- Maryland Constitution Article III, § 40. Eminent Domain. "The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation."
- Maryland Constitution Article III, § 40A. Montgomery County. "The General Assembly shall enact no law authorizing property to be taken for public use without just compensation, to be agreed upon between the parties, or awarded by a jury, being

first paid or tendered to the party entitled to such compensation ... ; and where such property is situated in Montgomery County and in the judgment of and upon a finding by the County Council of said County that there is immediate need therefor for right of way for County **roads or streets**, the County Council may provide that such property may be taken immediately upon payment therefor to the owner or owners thereof, or into court, such amount as a licensed real estate broker appointed by the County Council shall estimate to be the fair market value of such property, provided that the Council shall secure the payment of any further sum that may subsequently be awarded by a jury ... " (Emphasis added.)

o Maryland Constitution Article III, § 40B. Quick Take. "The General Assembly shall enact no law authorizing private property to be taken for public use without just compensation, to be agreed upon between the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation, except that where such property in the judgment of the State Roads Commission is needed by the State **for highway purposes**, the General Assembly may provide that such property may be taken immediately

upon payment therefor to the owner or owners thereof by said State Roads Commission, or into Court, such amount as said State Roads Commission shall estimate to be of the fair value of said property, provided such legislation also requires the payment of any further sum that may subsequently be awarded by a jury." (Emphasis added.)

PERTINENT MARYLAND STATUTES

o Transportation Article § 8-101. Definitions.

"(a) In general. - In this title the following words have the meanings indicated...

(f) County Road. - "County road" means any public highway:

(1) The title to which or the easement for the use of which, is vested in a public body or governmental agency; and

(2) That is **not a State highway** or located in Baltimore City...

(h) Highway. - "Highway" includes:

(1) Rights-of-way, roadway surfaces, roadway upgrades, shoulders, median dividers, drainage facilities and structures, **related stormwater management facilities and structures**, roadway cuts, roadway fills, guardrails, bridges, highway grade

separation structures, railroad grade separations, tunnels, overpasses, underpasses, interchanges, entrance plazas, approaches, and other structures **forming an integral part of a street, road, or highway**, including bicycle and walking paths; and

(2) Any other property acquired for the construction, operation, or **use of the highway**...

(n) Road. - "Road" means a highway...

(p) State highway. - **"State highway" means any public highway owned by this State**...

(r) Street. - "Street" means a highway." (Emphasis added.)

o Transportation Article. § 8-302. General power to acquire private property.

"(a) Acquisition by Administration. - The Administration may acquire for this State, by condemnation under Title 12 of the Real Property Article or by lease, agreement, gift, grant, purchase, or otherwise, any private property for any public purpose that it considers necessary or desirable to perform the duties imposed by this title or **for any other purpose authorized under this title**.

(b) Condemnation by Commission.- On behalf of and at the request of the Administration, the State Roads

Commission may exercise the authority vested in it by Article III, § 40B of the State Constitution and acquire for this State, by condemnation under Part III or Part IV of this subtitle, **any private property for any highway purpose**." (Emphasis added.)

- Transportation Article. § 8-303. Transfers between State and political subdivision. "(a) Power of Administration in general. - As provided in this section, the Administration may acquire any publicly owned property or jurisdiction over it, for any purpose authorized by this subtitle.

  (b) Transfers by governmental units. - (1) Notwithstanding any other provision of law, any political subdivision or agency of State or local government may transfer to this State, for use by the Administration in a highway project, any publicly owned property or jurisdiction over it, as necessary or desirable for that project."

- Transportation Article. § 8-304. Change of Status of State Highways and County Roads. "(a) Power to change status. - The Administration and any political subdivision may agree to transfer title to, jurisdiction over, or responsibility for maintenance of: (1) A county road to this State; or (2) A State highway to

the political subdivision."

- Transportation Article. § 8-313. Acquistion of land to protect highways. "(a) Purposes of acquisition. - (1) Any land may be acquired under this subtitle for **any State highway** construction purpose." (Emphasis added.)

- Transportation Article. §8-318. Quick Take.

"(a) Available procedures. - If property is to be condemned under this subtitle for a highway purpose, the Administration shall request the Commission to condemn the necessary property under this part. However, if the Commission considers the procedures of this part inappropriate, the property may be condemned by the Commission under Part IV of this subtitle or by the Administration under Title 12 of the Real Property Article.

(b) Applicability of general condemnation law.- Except as provided in this part, condemnation proceedings under this part shall follow the procedures set forth in Title 12 of the Real Property Article and the Maryland Rules."